TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~282~~ 82.

MILTENBERGER LAWDER, PERCY M. LAWDER, AND W. WARD LAWDER, COPARTNERS TRADING AS S. M. LAWDER & SONS, PETITIONERS,

vs.

WILLIAM F. STONE, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF BALTIMORE, MARYLAND.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 15, 1901.
CERTIORARI AND RETURN FILED JUNE 21, 1901.

(18,117.)

(18,117.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 298.

MILTENBERGER LAWDER, PERCY M. LAWDER, AND W. WARD LAWDER, COPARTNERS TRADING AS S. M. LAWDER & SONS, PETITIONERS,

vs.

WILLIAM F. STONE, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF BALTIMORE, MARYLAND.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 14, 1901.

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a *Transcript of Record.*

United States Circuit Court of Appeals, Fourth Circuit.

WILLIAM F. STONE, Collector of Customs for the District of Baltimore, Maryland, Appellant,
versus
MILTENBERGER LAWDER, PERCY M. LAWDER, and W. Ward Lawder, Copartners Trading as S. M. Lawder & Sons, Appellees. } No. 329.

Appeal from the circuit court of the United States for the district of Maryland.

Record filed August 26th, 1899.

Clerk's office, U. S. circuit court of appeals, fourth circuit. H. T. Meloney, clerk, Richmond.

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

At a circuit court of the United States for the fourth circuit, in and for the district of Maryland, begun and held at the court-house in the city of Baltimore, on the first Monday of April, being the third day of the same month, in the year of our Lord, one thousand eight hundred and ninety-nine.

Present: The Honorable Thomas J. Morris, judge of the Maryland district; John C. Rose, Esquire, attorney; William F. Airey, Esquire, marshal; James W. Chew, clerk.

Among other were the following proceedings, to wit:

WILLIAM F. STONE, Collector of Customs for the District of Baltimore, Maryland,
vs.
MILTENBERGER LAWDER, PERCY M. LAWDER, and W. WARD Lawder, Copartners Trading as S. M. Lawder and Sons.

Appeal of William F. Stone, Collector, from the Decision of the Board of U. S. General Appraisers.

Filed 22 August, 1898.

In the Circuit Court of the United States in and for the District of Maryland.

WILLIAM N. STONE, Collector of Customs, District of Baltimore, Maryland,
vs.
MILTENBERGER LAWDER, PERCY M. LAWDER, and W. WARD Lawder, Copartners Trading as S. M. Lawder & Sons.

To the honorable the judges of the said court:

William F. Stone, collector of customs for the district of
2 Baltimore, Maryland, hereby appeals to your honorable court for a review of the decision of the honorable board of the United States general appraisers, being general appraisers' decision No. 4,222, rendered July 26th, 1898, in the matter of an allowance on account of an alleged shortage claimed on certain alleged rotten and worthless pineapples, portions of various cargoes, as hereinafter set forth, imported by Miltenberger Lawder, Percy M. Lawder and W. Ward Lawder, copartners trading as S. M. Lawder & Sons; the said decision being rendered upon, among others, the following protests, viz:

Protest No. 33,880-B-394, relating to certain pineapples imported in the vessel "Amelia Hearn," entry No. 3,053, entered May 29th 1897.

Protest No. 33,884-B-399, imported in the following vessels, viz: "Atelia Carleton," entry number 3,859, entered June 24th, 1897.

"F. G. French," entry No. 3,460, entered June 14th, 1897.

"Robert A. Snow," entry No. 3,687, entered June 18th, 1897.

"Maggie A. Phillips," entry No. 3,299, entered June 3rd, 1897.

Protest No. 33,881-B-414, relating to certain pineapples imported in the following vessels, viz:

"E. S. Johnson," entry No. 3,471, entered June 16th, 1897.

"Cora M.," entry No. 3,587, entered June 17th, 1897.

"Venus," entry No. 3,649, entered June 18th, 1897.

"Lady Shea," entry No. 3,688, entered June 22nd, 1897.

"F. M. Balano," entry No. 3,689, entered June 23rd, 1897.

"Maud Seward," entry No. 3,851, entered June 29th, 1897.

"E. L. Martin," entry No. 3,940, entered July 2nd, 1897.

Protest No. 33,892-B-415, relating to certain pineapples imported in the following vessels, viz:

Vessels.	No.	Entered.
Charles Linthicum	4,021	July 7, '97
Fred. Emerson	3,186	June 3, '97
Eva May	3,204	June 4, '97
A. V. S Woodruff	3,264	June 7, '97
Jno. H. Cannon	3,300	June 9, '97
Jno. I. Snow	3,423	June 14, '97
F. W. McCullough	3,454	June 16, '97
Fiheman	3,461	June 17, '97

3 And this petitioner assigns as the errors of law and fact made by said United States board of general appraisers the following:

First. The general appraisers decided that when pine-apples, included in a single invoice, are imported in bulk, any individual pineapple which may become so damaged during the voyage, and before entry, as to be utterly valueless and worthless, is to be deducted from the number of pineapples in said invoice upon which the importer can be required to pay duty. In so deciding, this petitioner alleges that said board of general appraisers erred in matter of law, and that the proper rule to be applied in such case is that an importation in bulk of pineapples, included in a single invoice, is to be considered as a whole, and that the importer thereof is entitled to no allowance for damage, injury or deterioration happening to any portion of the pineapples included in said invoice, unless for such pineapples as may be lawfully abandoned by said importer under the provisions of section 23 of the act of June 10th, 1890.

Second. That said decision of the board of general appraisers was also based in part upon the assumption that the condition of imported merchandise is a material consideration in the assessment of duty thereon, which assumption your petitioner assigns as an error of law; and your petitioner claims that merchandise actually, physically imported in any condition, whatsoever, is subject to duty, unless abandoned under the provisions of section 23 of the act of June 10th, 1890.

Third. The quantity of damaged, worthless and valueless pineapples in each importation, except in the importation in the vessel "Amelia Hearn," entry No. 3,053 aforesaid, was less than ten per cent. of the total value or quantity of the invoice covering said merchandise, and consequently no abandonment of said goods was or could have been made to the Government under the provisions of sec. 23 as aforesaid, and duty was properly assessed upon the entire invoice quantity, and your petitioner alleges that the said board of general appraisers erred as a matter of law in deciding that from the said invoice quantity should be deducted the number of pine apples which became so damaged during said voyage as to be utterly valueless and worthless at the time of their entry. In the case of the said importation in the "Amelia Hearn," there was no abandonment by the importers of any portion of the pineapples included in the invoice and entry, the cargo of said vessel.

4 Fourth. That the said board of United States general appraisers erred in matter of fact in said decision in deciding that under protest No. 394 the number of pineapples imported by the said S. M. Lawder and Sons was $952\frac{5}{12}$ dozen, when this petitioner says the true number thereof, imported was $1,179\frac{5}{12}$ dozen; and that the said board further erred in deciding that under protest No. 399 the number of pineapples imported by the said S. M. Lawder and Sons was $23,959\frac{8}{12}$ dozen, when this petitioner says the true number imported by the said S. M. Lawder and Sons was $25,416\frac{4}{12}$ dozen; and that said board further erred in deciding that under protest No. 414 the number of pineapples imported by the said S. M. Lawder and Sons was $43,914\frac{0}{12}$ dozen, when this petitioner says the true number thereof imported was $46,371\frac{6}{12}$ dozen; and that said board further erred in deciding that under protest No. 415, the number of pineapples imported by the said S. M. Lawder and Sons was $53,137\frac{6}{12}$ dozen, when this petitioner says the true number thereof imported was $54,776\frac{3}{12}$ dozen.

In order that the said decision of the board of United States general appraisers may be reversed upon the questions of law and fact involved, your petitioner prays that a copy of the aforegoing application and statement may be served upon the said Miltenberger Lawder, Percy M. Lawder and W. Ward Lawder, copartners trading as S. M. Lawder and Sons, as required by section 15 of the act entitled "An act to simplify the laws in relation to the collection of revenue," approved June 10th, 1890.

And, as in duty, &c.

A. LINCOLN DRYDEN,
Special Deputy Collector of Customs.
JOHN C. ROSE,
U. S. Attorney.

MEM.—A copy of which said appeal was delivered to the marshal to be served on the defendants or appellees.

Marshal's Return.

"Copy of within statement of appeal served upon Miltenberger Lawder, Percy M. Lawder and W. Ward Lawder, copartners trading as S. M. Lawder & Sons, by leaving a copy with Percy M. Lawder, one of the partners, this 25th day of August, 1898.

WM. F. AIREY,
U. S. Marshal."

5 *Order of Court on Board of U. S. General Appraisers.*

Filed 20 September, 1898.

In the Circuit Court of the United States for the District of Maryland.

WILLIAM F. STONE, Collector, &c., }
vs. }
MILTENBERGER LAWDER, PERCY M. LAWDER, and W. WARD LAWDER, Copartners Trading as S. M. Lawder & Son. }

A copy of the petition in the above-entitled cause having been duly served on the defendants, as appears by the return of the U. S. marshal, it is thereupon ordered by the court this 20th day of September, A. D. 1898, that the board of United States general appraisers return to the circuit court of the United States for the district of Maryland the record and the evidence taken before them, together with a certified statement of the facts involved, in the matter of the protest No. 33,880–B-394 and the assessment of duties by them on one lot of pineapples imported by the said S. M. Lawder & Sons, on the 29th day of May, 1897, in the vessel "Amelia Hearn" and their decision thereon; and in the matter of protest No. 33,884–B-399 and the assessment of duties by them on one lot of pineapples imported by the said S. M. Lawder and Sons on the 24th day of June, 1897, on the vessel "Atelia Carleton," and their decision thereon; and on one lot of pineapples imported by the said S. M. Lawder & Sons on the 14th day of June, 1897, in the vessel "F. G. French," and their decision thereon; and on one lot of pineapples imported by the said S. M. Lawder & Sons on June 18th, 1897, on the vessel "Robert A. Snow," and their decision thereon; and on one lot of pineapples imported by the said S. M. Lawder & Sons on the 3rd day of June, 1897, on the vessel "Maggie A. Phillips," and their decision thereon; and in the matter of protest No. 33,881–B-414 and the assessment of duties by them on seven lots of pineapples imported by the said S. M. Lawder & Sons as follows, to wit: On June 16th, 1897, in the vessel "E. S. Johnson;" on June 17th, 1897, on the vessel "Cora M.;" on June 18th, 1897, on the vessel "Venus;" on June 22d, 1897, on the vessel "Lady Shea;" on June 23d, 1897, on the vessel "F. M. Balano;" on June 29th, 1897, on the vessel "Maud Seward;" on July 2d, 1897, on the vessel "E. L. Mar-

6 tin;" and in the matter of protest No. 33,892–B-415 and the assessment of duties by them on eight lots of pineapples imported by the said S. M. Lawder & Sons, as follows, to wit: On July 7th, 1897, in the vessel "Charles Linthicum;" on June 3rd, 1897, on the vessel "Fred. Emerson;" on June 4th, 1897, on the vessel "Eva May;" on June 7th, 1897, on the vessel "A. V. S. Woodruff;" on June 9th, 1897, on the vessel "John H. Cannon;" on June 14th, 1897, on the vessel "John I. Snow;" on June 16th, 1897, on the

vessel "F. W. McCullough;" on June 17th, 1897, on the vessel "Fichman," and their decision thereon.

THOS. J. MORRIS, *Judge.*

MEM.—A coy of which said order was forwarded to said board of U. S. general appraisers at New York on the 21st day of September, 1898, by the clerk of said court.

Return of Board of U. S. General Appraisers.

Filed 4 February, 1899.

In the Circuit Court of the United States for the District of Maryland.

J. R. Lake, chief clerk, board of U. S. general appraisers. [Seal.]

Suit No. 1408. Return of the board of United States general appraisers to the order of Hon. Thos. J. Morris, district judge, dated New York, Feb. 3, 1899.

In the matter of the collector of customs at Baltimore, Md., for a review of the decision of the board of U. S. general appraisers as to the rate, etc., of duty on certain pineapples imported by S. M. Lawder & Son in the vessels and on the dates named herein.

The board of United States general appraisers, sitting at New York, in response to the order of the court in the above matter, make the following return of the record and evidence taken by them in the above matter, and of the facts involved therein, as ascertained by them.

They state that a letter, a copy of which is hereto annexed as "Exhibit A," was received from the collector of customs at Baltimore, Md., submitting, under the provisions of section 14 of the act of June 10, 1890, the protests marked "Exhibits B, C, D & E" and described as follows:

7

Coll's No.	Board No.	Protestants.	Vessel.	Date of entry.
394	33,880-B	S. M. Lawder & Son...	Amelia Hern...	May 29, '97.
399	33,884-B	"	Various	.....
414	33,891-B	"	Various	.....
415	33,892-B	"	Various	.....

In its consideration of said protests, the board had before it certain testimony this day returned as "Exhibit C" in suit 1,402 (*In re* Owen) which is referred to and made part of this return.

On the 26th of July, 1898, the board rendered its decision upon said protest. A copy of the opinion, known as G. A. 4,222, is annexed as "Exhibit F."

"EXHIBIT A."

Protest No. —, page —.

Copy.

OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF BALTIMORE, *August* 30, 1897.

To the president of the board of U. S. general appraisers, New York city.

SIR: I transmit herewith the protests (as per annexed schedule) against the action of this office in assessing duty on certain pineapples, without making an allowance for that portion of the cargoes reported by the discharging officer and the U. S. appraiser as slush. It is only necessary to state that this office was governed by department's instructions of Sept. 26, 1896, S. S. 17,426.

The requirements of sec. 14 of the act of June 10, 1890, have been complied with.

(S'd) JAS. A. DIFFENBAUGH,
Spec. Dep. Coll.

I concur.

(S'd) BAXES COMPTON,
Naval Officer.

Schedule.

See page 2 of this return.

8 EXHIBIT B.

F. H. Shallus,

Custom-house broker,

Forwarding, collection, and commission agent.

55 South Gay street.

BALTIMORE, *July 27th*, 1897.

No. 394.

Hon. Frank T. Shaw, collector of customs, city.

SIR: We do hereby protest against the payment of duty at the rate of twenty per centum ad valorem, as charged on certain twenty-seven hundred and thirty damaged pineapples, supposed to be, or contained in a mass of unrecognizable lot of slush and tops, imported per Schr. "Amelia Hearn," from Gove-nor's harbor, B. W. I. May 28th, 1897, and embraced in entry No. 3,053, passed May 28th, 1897, entry liquidated July 21, 1897.

In support of our protest, would state that this mass of matter was taken from the vessel, and, being a menace to public health, was taken outside the city limits and dumped as garbage, and, not hav-

ng been landed within the meaning of the law, should be treated as a shortage, as cited in decision- 14,384 and 14,758.

There is no question but that this slush was originally, when shipped from the islands, good pineapples, but became rotten on the voyage, and that on their arrival here could not be recognized as "damaged pineapples," but as a mass of worthless matter, having lost their identity entirely.

We cannot believe that it is the intention of Congress to compell us to pay duty on merchandise which has never arrived in the United States, or, if considered to have arrived worthless, that the importer should have no relief. And in support of this position would respectfully refer you to decisions 10,336 and 11,373, also 16,761.

We have paid the amount exacted, and claim to have same refunded.

Very respectfully, *p. p.* S. M. LAWDER & SON.
S. E. PENTZ.

33,880 B.

Custom-house, Baltimore, Md.

Collector's office, liquidating dep't.

Received this 27 day of July, 1897.

G. McC. R.,
For Collector.

9 EXHIBIT C.

F. H. Shallus,

Custom-house broker,

Forwarding, collection, and commission agent,

55 South Gay street.

BALTIMORE, *July 29th*, 1897.

No. 399.

Hon. Frank T. Shaw, collector of customs, city.

SIR: I do hereby protest against the payment of duty at the rate of twenty per centum ad valorem as charged on certain forty-four hundred and eighty, sixty hundred, sixty-five hundred and twenty, and four hundred and eighty damaged pineapples, supposed to be or contained in a mass of unrecognizable lot of slush and tops, imported per schooners "Atelia Carleton," "G. F. French," "Robert A. Snow," and "Maggie A. Phillips," from Eleuthera, Governor's harbor, Eleuthera and Gove-nor's harbor, B. W. I., June 24th, June 14th, June 18th and June 3rd, 1897, and embraced in entries Nos. 3,859, 3,460, 3,687 and 3,299, passed June 29th, June 16th, June 9th and June 23rd, 1897, respectively, entries liquidated July 28th, 1897.

In support of our protest, would state that this mass of matter was

taken from the vessels, and, being a menace to public health, was taken outside the city limits and dumped as garbage, and not having been landed within the meaning of the law, should be treated as a shortage, as cited in decision- 14,384 and 14,758.

There is no question, but that this slush was originally, when shipped from the islands, good pineapples, but became rotten on the voyage, and that on their arrival here could not be recognized as "damaged pineapples," but as a mass of worthless matter, having lost their identity entirely.

We cannot believe that it is the intention of Congress to compel us to pay duty on merchandise which has never arrived in the United States, or, if considered to have arrived worthless, that the importer should have no relief, and in support of this position would respectfully refer you to decisions 10,336 and 11,373, also 16,761.

We have paid the amount exacted and claim to have same refunded.

Very respectfully, *p. p.* S. M. LAWDER & SON.
S. E. PENTZ.

10 33,884 B.

Custom-house, Baltimore, Md.

Collector's office, liquidating dep't.

Received this 29 day of July, 1897.

G. McC. R.,
For Collector.

EXHIBIT D.

F. H. Shallus,

Custom-house broker,

Forwarding, collection, and commission agent,

55 South Gay street.

BALTIMORE, *August 6th*, 1897.

No. 414.

Hon. Frank T. Shaw, collector of customs, city.

SIR: We do hereby protest against the payment of duty at the rate of twenty per centum ad valorem, as charged on certain quantities of damaged pineapples, supposed to be, or contained in a mass of unrecognizable lot of slush and tops, imported as follows:

Schr. "E. S. Johnson," from Gove-nor's harbor, B. W. I., June 15, '97. Entry No. 3,471, passed June 16, '97, entry liquidated August 4th, 3,640 pineapples.

Schr. "Cora M.," from Gove-nor's harbor, B. W. I., June 17, '97. Entry No. 3,587, passed June 19, '97, entry liquidated August 4th, 3,000 pineapples.

Schr. "Venus," from Gove-nor's harbor, B. W. I., June 18, '97.

Entry No. 3,649, passed June 21, '97, entry liquidated August 4th, 8,320 pineapples.

Schr. "Lady Shea," from Gove-nor's harbor, B. W. I., June 23, '97. Entry No. 3,688, passed June 23, '97, entry liquidated August 4th, 4,700 pineapples.

Schr. "Fred. B. Balano," from Gove-nor's harbor, B. W. I., June 23, '97. Entry No. 3,689, passed June 23, '97, entry liquidated August 4th, 1,720 pineapples.

Schr. "Maud Seward," from Gove-nor's harbor, B. W. I., June 26, '97. Entry No. 3,851, passed June 29, '97, entry liquidated August 4th, 4,120 pineapples.

Schr. "E. L. Martin," from Cat island, B. W. I., July 2, '97. Entry No. 3,940, passed July 2, '97, entry liquidated August 4th, 3,880 pineapples.

In support of our protest, would state that this mass of
11 matter was taken from the vessel, and, being a menace to public health, was taken outside the city limits and dumped as garbage, and not having been landed within the meaning of the law, should be treated as a shortage, as cited in decision- 14,384 and 14,758.

There is no question but that this slush was originally, when shipped from the islands, good pineapples, but became rotten on the voyage, and that on their arrival here could not be recognized as "damaged pineapples," but as a mass of worthless matter, having lost their identity entirely.

We cannot believe that it is the intention of Congress to compel us to pay duty on merchandise which has never arrived in the United States, or, if considered to have arrived worthless, that the importer should have no relief. And in support of this position, would respectfully refer you to decisions 10,336 and 11,373, and also 16,761.

We have paid the amounts exacted, and claim to have same refunded.

Very respectfully, *p. p.* S. M. LAWDER & SON.
S. E. PENTZ.

33,891 B.

Custom-house, Baltimore, Md.

Collector's office, liquidating dep't.

Received this 7 day of August, 1897.

G. McC. R.,
For Collector.

EXHIBIT E.

F. H. Shallus,

Custom-house broker,

Forwarding, collection, and commission agent,

55 South Gay street.

BALTIMORE, *Aug. 6th*, 1897.

No. 415.

Hon. Frank T. Shaw, collector of customs, city.

SIR: We do hereby protest against the payment of duty at the rate of twenty per centum ad valorem as charged on certain quantities of damaged pineapples, supposed to be or contained in a mass of unrecognizable lot of slush and tops, imported as follows:

12 Schr. "Charles Linthicum," from Gregorytown, B. W. I., July 6, '97. Entry No. 4,021, passed July 6, '97, entry liquidated August 4th, 3,120 pineapples.

Schr. "Fred Emerson," from Cat island, B. W. I., June 1, '97. Entry No. 3,186, passed June 3, '97, entry liquidated August 4th, 2,440 pineapples.

Schr. "Eva May," from Gove-nor's harbor, B. W. I., June 2, '97. Entry No. 3,204, passed June 4, '97, entry liquidated August 4th, 1,960 pineapples.

Schr. "Arthur V. S. Woodruff," from Eleuthera, B. W. I., June 4, '97. Entry No. 3,264, passed June 7, '97, entry liquidated August 4th, 1,000 pineapples.

Schr. "John H. Cannon," from Hatchet bay, B. W. I., June 4, '97. Entry No. 3,300, passed June 9, '97, entry liquidated August 4th, 1,000 pineapples.

Schr. "John I. Snow," from Eleuthera, B. W. I., June 12, '97. Entry No. 3,423, passed June 14, '97, entry liquidated August 4th, 880 pineapples.

Schr. "Frank W. McCullough," from Governor's harbor, B. W. I., June 14, '97. Entry No. 3,454, passed June 16, '97, entry liquidated August 4th, 4,025 pineapples.

Schr. "Fiheman," from Eleuthera, B. W. I., June 14, '97. Entry No. 3,461, passed June 17, '97, entry liquidated August 4th, 5,240 pineapples.

In support of our protest, would state that this mass of matter was taken from the vessel, and, being a menace to public health, was taken outside the city limits and dumped as garbage, and not having been landed within the meaning of the law, should be treated as a shortage, as cited in decision- 14,384 and 14,758.

There is no question but that this slush was originally, when shipped from the islands, good pineapples, but became rotten on the voyage, and that on their arrival here could not be recognized as

"damaged pineapples," but as a mass of worthless matter, having lost their identity entirely.

We cannot believe that it is the intention of Congress to compel us to pay duty on merchandise which has never arrived in the United States, or, if considered to have arrived worthless, that the importer should have no relief. And in support of this position would respectfully refer you to decisions 10,336 and 11,373, also 16,761.

We have paid the amount exacted and claim to have same refunded.

Very respectfully, *p. p.* S. M. LAWDER & SON.
S. E. PENTZ.

13 33,892 B.

Custom-house, Baltimore, Md.

Collector's office, liquidating dept.

Received this 7 day of Aug., 1897.

G. McC. R.,
For Collector.

EXHIBIT F.

(19,774, G. A., 4,222.)

Short Shipment.

On an importation of pineapples, some of which became rotten in transit, and are cast into the dump, it is proper for the collector to allow for such damaged portions as a short shipment, in accordance with the ruling of the United States circuit court in Shaw *v.* Dix (72 Fed. Rep., 166).

Before the U. S. general appraisers at New York, July 26, 1898.

In the matter of the protests 33,880*b*, etc., of S. M. Lawder & Son *et al.* against the decision of the collector of customs at Baltimore, Md., as to the rate and amount of duties chargeable on certain merchandise imported per the vessels and entered on the dates named in the schedule.

Opinion by Sommerville, General Appraiser.

The importation in question consists of pineapples from the Bahama islands, a portion of which was damaged by decay so as to be reduced to "slush," and thus became totally unmerchantable and of no pecuniary value. The rotten portion of the fruit, in the form of slush, was shoveled from the decks of the vessel and cast into a dump.

The collector assessed duty on the entire lot of fruit under the appropriate paragraph of the tariff act of 1894, without allowing any deduction for shortage, and justifies his action under instruction of the Treasury Department contained in synopsis 17,426, dated September 26, 1896.

The importers claim that they are entitled to such a deduction under the principle settled by the United States circuit court for the district of Maryland in Shaw *v.* Dix, (72 Fed. Rep., 166), from which no appeal was taken by the Government (synopsis 16,761).

The evidence shows satisfactorily that the value of the rotten fruit did not amount in either case to as much as 10 per cent. of the total quantity or value of the invoice.

14 The board would be disposed, but for judicial decision to the contrary, to sustain the action of the collector, in view of the fact shown by the record that the practice has been for importers to abandon such importations to the Government under the provisions of section 23 of the customs administrative act of June 10, 1890, as cases of damage, and not shortage, where the percentage of damage is over 10 per cent. of the invoice value or quantity. (United States *v.* Bache, 8 C. C. A., 258; 59 Fed., 762.)

But the board considers the decision of Shaw *v.* Dix, *supra*, not only as parallel in principle, but of binding authority, and hence sustains all of the protests, and reverses the collector's decision in each case, with instructions to reliquidate the entries.

(S'd) H. M. SOMMERVILLE,
GEO. C. TICHENOR,
J. B. WILKINSON, JR.,
Board of Classification of U. S. Gen. Apps.

For schedule see page 2 of this return.

And for a certified statement of the facts involved in said matter, as ascertained by them, the said board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said board than such as are shown by said decision and other exhibits hereto attached.

H. M. SOMMERVILLE,
GEO. C. TICHENOR,
J. B. WILKINSON, JR.,
Board of U. S. General Appraisers.

Petition of William F. Stone, Collector, to Take Further Testimony, and Order of Court Thereon.

Filed 21 February, 1899.

In the Circuit Court of the United States for the District of Maryland.

WILLIAM F. STONE, Collector of Customs, District of Baltimore, Maryland,
vs.
S. M. LAWDER & SONS.

To the honorable the judges of said court:

The petition of William F. Stone, collector of customs for the district of Baltimore, Maryland, hereby respectfully represents.

15 (1.) That upon the court's order of September 20th, 1898, passed in this case, the board of United States general appraisers has returned the record and certified statement of facts involved in this appeal unto this court.

(2.) That your petitioner desires to take further testimony, in support of this appeal, before one of the general appraisers.

He, therefore, prays the court for an order referring the record, evidence &c. to one of said general appraisers, as an officer of the court, to take and return to this court, such further evidence as your petitioner may offer.

JOHN C. ROSE,
U. S. District Attorney, for the Collector.

Ordered this 21st day of February, 1899, by the circuit court of the United States for the district of Maryland, that the record and evidence etc., returned by the board of United States general appraisers into this court in this case, be, and the same is, hereby referred to Thaddeus S. Sharretts, one of the board of United States general appraisers, who, as an officer of this court, shall take and return to this court such further evidence as may be offered upon the part of William F. Stone, collector.

THOS. J. MORRIS.

Order to Enter Appearance for Defendants.

Filed 21 March, 1899.

United States Circuit Court.

WILLIAM F. STONE, Collector of Customs, *vs.* MILTENBERGER LAWDER, PERCY M. LAWDER, & W. Ward Lawder, Trading as S. M. Lawder & Sons.	Civil B. No. 282.

Mr. Clerk:

Please enter my appearance for defendants in above-entitled cause.

JOHN E. SEMMES.

16 *Testimony Taken Before Thaddeus S. Sharretts, U. S. General Appraiser, Pursuant to the Order of Court of 21 February, 1899.*

Filed 6th April, 1899.

United States Circuit Court, District of Maryland.

No. 1,402–8.

In the matter of the application of the collector of customs at Baltimore, Md., for a review of the decision of the board of general appraisers as to the rate, etc., of duty on certain pineapples imported by the parties in the vessels and on dates named herein.

To the circuit court of the United States for the district of Maryland:

The undersigned, a general appraiser under the act of June 10th, 1890, to whom it was referred by this honorable court, by an order made February 21, 1899, to take further evidence in the above-entitled matter, do hereby return such further evidence taken by me pursuant to such order.

Dated New York, April 5th, 1899.

THAD. S. SHARRETTS,
United States General Appraiser, as an Officer of the Court.

51,834 Bo.

WILLIAM F. STONE, Collector of Customs, District of Baltimore, Maryland,
vs.
S. M. LAWDER & SON, JOHN W. SCHALL and ANNIE SCHALL, Executors of Thomas B. Schall; Edward A. Donnelly, Martin Wagner & Co., Webster, Ford & Co., Hugh S. Orem, and The Monumental Trading Co.

Present: Hon. Thaddeus S. Sharretts, Hon. John C. Rose, and Daniel R. Randall, Esq., for the collector, and Robert H. Smith, Esq., and other counsel for the appelle-s.

BALTIMORE, *March* 13, 1899.

Upon the petition of the Hon. William F. Stone, collector,
17 by John C. Rose, United States attorney, asking of the circuit court of the United States for the district of Maryland that additional testimony be taken in these appeals to said court, the Hon. Thomas J. Morris, judge, passed an order on the 21st day of February, 1899, directing Thaddeus S. Sharretts, one of the board of United States general appraisers, to take said testimony. General Appraiser Thaddeus S. Sharretts, after due notice to all parties concerned, took the following testimony:

WILLIAM S. POTTER, called as a witness on behalf of the collector, being duly sworn, testified as follows:

Mr. ROSE:

Q. Capt. Potter, what is your position?

A. I am a chief liquidating clerk in the Baltimore custom-house.

Q. How long have you been chief liquidating clerk?

A. Ten, nearly twelve years.

Q. Will you kindly produce the original invoice and entries in all the cases included in the pending appeals?

A. Yes, sir; here they are; they cover the cases, each importation.

Q. Will you please show, or can *can* you tell what appraiser or inspector actually discharged the cargo?

A. (Examines papers.) Hugh S. Orem (importer), schooner, Charles Linthicum; the invoice calls for 2,000 dozen pineapples; of course, 2,000 dozen were entered, and the debt paid at the rate of 20% ad valorem, value correct; 22,070 good pines; 1,225 slush; James H. Butler, appraiser. R. H. Cameron, inspector.

Q. Who makes these reports?

A. They are reported by the inspector by the dozen; he makes the return as $1,839\frac{2}{12}$ dozen sound, which means good pines, and $102\frac{1}{12}$ slush, making a total of $1,941\frac{3}{12}$, and of this cargo of 2,000 dozen, making an actual shortage of $58\frac{9}{12}$ dozen, and so a protest is filed against the $102\frac{1}{12}$ dozen slush, and upon that we assessed a debt of 20% and, against that this protest is filed. That appears to be a *bona fide* shortage for which we make an allowance. I have

an entry of Thomas B. Schall's by the schooner "Brothers;" the invoice calls for 4,000 dozen at 25 cents a dozen, making it $960; the appraiser reports 300 dozen slush.

Q. Any excess there?

A. I think there is; the inspector reports 5,877½ dozen good, and 587½ dozen specks.

Q. What do you mean by specks?

A. They show some evidence of decay. We treat the excess in the same way.

18 Mr. SMITH:

Q. You no doubt accept what the papers say, and do not make a personal inspection?

A. No, sir; I have seen the cargoes and this so-called slush at times; I do not know that I have seen that entry, but I have visited the wharves, but I could not swear to this particular cargo.

Q. Suppose that of a particular importation of pineapples 4% were returned as slush, and 7% as specks, would the Government allow the importer to claim damage to 11% of the importation, and consequently to have the right of abandonment?

A. Yes, sir.

ROBERT H. CAMERON, called as a witness on behalf of the collector, being duly sworn, testified as follows:

Mr. ROSE:

Q. What is your position Mr. Cameron?

A. Inspector of customs.

Q. How long have you been an inspector?

A. Since 1882.

Q. Continuously in the service?

A. Yes, sir.

Q. Mr. Cameron, look at the return of merchandise unladen aboard the British schooner "Brothers," returned June 8th, 1897, and state if that is your signature?

A. Yes, sir, that is my signature.

Q. What were your duties with reference to this cargo on board this schooner?

A. To get an account of the fruit delivered and return same.

Q. Will you tell me how you got the account of the fruit on that vessel?

A. The fruit is gotten up from the hold in baskets and they pack up two at a time and when they count up to fifty they call "tally."

Q. I notice you divide them into three classes, good, specks and slush, how do you count the specks?

A. If any specks are found, these are counted afterwards in the same way.

Q. You have 300 dozen slush, how do you determine they were slush?

A. It is passed up out of the hold and when they are done discharging we fill up several baskets, count the number of tops and

strike an average, and then we tally by the whole number of baskets and in that way we get at the number and this is the closest that can be gotten.

Q. That is done in the presence, usually, of some one, inspector and the importers?

A. Yes, sir.

Q. Any objection made to your estimate?

A. No, sir.

Q. And then there is generally enough left over to say this was a pineapple?

A. Yes, sir.

Q. What proportion do you suppose of these in the baskets still exist in such form as you can identify them?

19 A. In some cases you can identify three-fourths and sometimes only one-fourth.

Q. On what rule of thumb do you estimate the number of pineapples in those baskets of slush?

A. We do the best we can and take what we think will make a whole pineapple.

Q. You know by this time about how many pineapples those baskets will hold?

A. I do.

Q. About what do they run?

A. The beginning of the season they come large and about the end of the season they will hold nearly twice as many, and has to be taken into consideration.

Q. How long have you been discharging pineapples?

A. I think about three years. I was during all of 1897 and one year before that, but there was no duty on them at that time.

Q. And you are satisfied that while it may not have been precisely accurate, and that there might not have been 300 dozen, it did not vary far from 300 slush?

A. I think not.

Q. Taking all the importations together, on the average, about what proportion, in your judgment, of the pineapples have been classed as slush are identifiable as separate pineapples?

A. I would not think one-half.

Q. In your judgment, how much below half?

A. I would think; taking the season through, I could identify one-fourth of the whole number as being pineapples.

Q. Of the good pineapples, do all of them retain what *what* are called their tops?

A. Not all.

Q. The tops of pineapples are not easily destroyed?

A. Not easily, no, sir.

Q. Would it be possible to estimate the number of pineapples originally shipped on that vessel by counting all the tops?

A. I should think we could come very close to it. I think they sometimes assort the cargoes on their way here and some are thrown overboard and there may be some tops left.

Mr. SMITH:

Q. Is the slush the last thing taken?
A. Yes, sir.
Q. How are the baskets filled?
A. Shovelled in with a shovel or fork.
Q. In each of these cargoes did you take a few baskets and count them?
A. Yes, sir. Always, unless it is a very small amount and we know it is only a few baskets.
Q. The baskets which you first count, or estimate, how do you estimate the number of pines?
A. By counting what we think are pineapples.
Q. But I understand a good deal is in liquid form?
20 A. Yes, sir, but there is generally a butt or top to identify it.
Q. If you find fifty tops in a basket, you would estimate from that?
A. No, sir, we would not do in that way at all.
Q. How would you do it?
A. We would shovel in the pile, and there would be 24 or 25, and sometimes 35, or close to that.
Q. You say they run from 25 to 35?
A. I think 30 is the average.
Q. Is it not a fact that they shovel the slush up as it comes?
A. Yes, sir, and sometimes there are but a few tops in one basket.
Q. And can you in that way form a fair estimate of the pineapples in that slush?
A. I think so.
Q. Is it not a fact your estimate might be very far from wrong?
A. It might be.
Q. Is it not a fact that many of those pineapples lose their identity altogether?
A. Yes, sir.
Q. What is done with this slush?
A. Taken down the river and then thrown overboard.
Q. Where is it taken out *out* of the schooner?
A. Somewheres near Sparrows Point.
Q. Where do you see it measured?
A. Right on the vessel, and on to the other.
Q. Do you mean the whole slush?
A. In some cases when there is very little of it.
Q. Do you remember the schooner "Brothers"?
A. Oh, no.
Q. Do you remember anything of the "Brothers"?
A. From the memorandum I made; I remember the "Brothers" being here.
Q. Do you remember anything about her cargo?
A. No, sir, I cannot say I do.
Q. But do you not remember anything about the condition of that cargo?
A. I do not, indeed.

Q. You ascertained the quantity of slush of that particular cargo?

A. I suppose it was acted on, same as the others were. You see, I had two or three assistants during the time, and probably two or three vessels discharging at the time, and I had sometimes to depend on other men.

Q. Are they here?

A. No. But I think they would be as correct as I.

Q. Is it not a fact that the tops decay and go to pieces?

A. I do not think the top does decay.

Q. Does it not go to pieces so you cannot recognize the individual pineapple?

A. I suppose it does sometimes, but it is very rare.

21 Q. Can you tell us what proportion of tops do go to pieces?

A. No, sir.

Q. You take no memorandum of the number of pineapples which are good or specked that have lost their tops?

A. No, sir.

Q. In estimating the quantity in these baskets that you measure, do you count only the tops?

A. We count what we think makes up the pineapple, and sometimes a butt and sometimes the top.

Q. Sometimes then you might count the butt and sometimes the top for two pineapples?

A. It might be.

Q. But you count both the pineapple and the butt?

A. Sometimes, yes.

Q. What determines whether you count the tops or the butts?

A. It is something like filling up a basket of potatoes. I estimate a basket of pineapples which I think was acceptable, and I think my estimate was about correct.

Q. In asking your method of arriving at it, I understand you to say you count every top and every butt?

A. I said I counted what I thought would make up a pineapple.

Q. Suppose you found fifty tops in a basket how many pineapples would you estimate in that basket?

A. If I found that many there, I might think there was that much.

Q. Now, I understand you to say nothing but butts or tops were taken for your estimate and you simply made a guess about how many pineapples there were in the baskets which you counted?

A. It was an estimate, not a guess; I based it on the general condition as found in that basket.

General Appraiser SHARETTS:

Q. In making your report, Mr. Cameron, as — the number of pineapples, did you report every pineapple that had any resemblance of a pineapple?

A. Yes, sir.

Q. Everything that would be found as the form of a pineapple you returned as a pineapple?

A. Yes, sir.

Mr. ROSE:

Q. Supposing in the cargo in which the sound ones ran about 25 to a basket, about how many would you estimate of slush in the baskets?

A. I never estimate in that way.

Q. You never made any such comparison?

A. No, sir.

WILLIAM M. WILSON, called as a witness on behalf of the collector, being duly sworn, testified as follows:

Mr. ROSE:

Q. You are a customs inspector?

A. Yes, sir.

Q. How long have you been in the service?

A. Eleven years.

22 Q. Have you had any experience in unlading vessels ladened with pineapples?

A. Yes, sir. My experience is similar to that of Mr. Cameron. I occupied the same position in 1898.

Q. Well, how do you determine the number of pineapples on a board a vessel?

A. Of all kinds?

Q. Yes, sir.

A. By the men at the hatchway.

Q. When you get down to this returned as slush, how do you get the number?

A. After the pile of slush is taken from the hold and is piled on deck, we then get an estimate after the discharge of the cargo, and it depends altogether on the size of the pile when we count it, and some would have a larger pile than others, and then we would take the percentage of part, and if we thought there was 100 baskets of slush, we would count ten or twelve baskets, and then we will strike an average on this ten or twelve baskets, *baskets*; we fill up a basket, tally and strike an average.

Q. You have to shovel a basket full of slush, and when you want to find out how many pineapples are in that basket, what do you do?

A. We count so many baskets, according to the pile, and strike an average. We take up a pine with the top attached to it and sometimes there is a whole pine which is intact and not squashy and sometimes nothing but a core. Then we generally get a sound pineapple top, and sometimes a resemblance of a top not fully developed, sprouts as it were.

Q. How large a proportion of slush is composed of pineapples which retain their form, but are counted as slush?

(Not ans'd.)

Q. Suppose you have a basket of slush, will there be many which will retain the form of a pineapple?

A. Very few.

General Appraiser SHARRETTS:

Q. Would that be an exception?
A. Generally, on an average.

Mr. SMITH:

Q. Mr. Wilson, this estimate that you made was in 1898?
A. Yes, sir.
Q. Was that your first experience?
A. Oh, no. There is one man detailed to have a general supervision, and for years I have had more or less experience in taking charge of vessels.
Q. These estimates that were made, did you make them yourself?
A. Very often, yes sir.
Q. You would have a basket filled and sent up on deck, and you would pour out that basket?
A. Well, as we took them out of the hold we would fill up the good baskets with those that were to be delivered immediately, and after while the baskets of slush came up and was dumped in a pile, and after the good was disposed of, we would dispose of the slush.

23 Q. You did not count it until it was all on deck?
A. Yes, sir; it was put in a pile to itself.
Q. Then you would measure up baskets again?
A. Yes, sir.
—. Then would you get an estimate of pines in one basket?
A. Yes, sir.
Q. Did you fill the basket up?
A. Yes, sir. We filled the basket, counted so many, and in this way took a note of this slush.
Q. I understand, Mr. Cameron, to say that a good deal of that slush is liquid?
A. That is very true, but that is running about on deck
Q. Did you, as a matter of fact, measure up any baskets?
A. Yes, sir.
Q. How are you going to get at the liquid?
A. By the tops representing the pineapples.
Q. It came out of the hold in baskets?
A. Yes, sir.
Q. And you kept an account of the baskets as they came up?
A. No, sir, not until we discharged the cargo.
Q. Did you measure it up?
A. Yes, sir. We counted and got an estimate. From this pile of slush we would make a guess, and try to get the percentage of baskets in that pile, and we would estimate that and then we would count the percentage by those tops, by striking an average of 8 or 10 baskets.
Q. How do you do that without putting them in the baskets?
A. That is what we do.
Q. But you only put the tops in?
A. We shovel the slush in; then there was sometimes a fragment of a pineapple.

Q. Did it give you any basis to estimate on?

A. This is the manner in which we do it; we do it according to the agreement of the people on both sides.

Q. You do not know how many baskets there were do you?

A. Yes, sir. We get the number of pineapples in the baskets, and then we put the others in the baskets, and measure them up, and then strike an average and put them in the vessel to receive the slush.

Q. When you were estimating the quantity in the baskets you counted the tops?

A. Yes, sir; generally taking good sound tops.

Q. The baskets that you counted simply had tops in them?

A. With what stuck to them.

Q. If there were 25 tops, you counted that 25 pineapples?

A. Yes, sir; if ten baskets, in some there might be 30, and we would strike an average by dividing by the number of baskets, and afterwards we would shovel them all up and make our basis.

24 Mr. ROSE:

Q. You state that this was done by agreement by both sides, who do you mean by both sides?

A. I never heard them complain, and I understood they agreed to it from my superior officers.

Q. Some part of the pineapples go to liquid down the hold?

A. Yes, sir.

Q. How do you get it out of the hold?

A. I do not know, but all the slush generally comes out, very little remains in the hold.

Q. How long does that pile of slush usually remain on deck before it is finally counted?

A. Sometimes we discharge in a day and sometimes several days: it depends upon the condition of the cargo; sometimes we have very little slush.

Q. The decomposition is usually very rapid is it not?

A. Yes, sir. It depends upon the bulk, but is greater in hot weather.

JACOB G. RICHARDS, called as a witness on behalf of the collector, being duly sworn, testified as follows.

Mr. ROSE:

Q. You are one of the appraisers?

A. Examiner.

Q. Have you charge of the department including the pineapples?

A. Yes, sir. I examine the fruit.

Q. What do you know of your own knowledge of the method of counting cargoes?

A. I only examine the quality, quantity and condition; my examination is taken out, probably, two or three times a day to see the condition of it.

Q. What was the purpose of that examination?

A. To see if actually damaged.

Q. Do you make the same examination if 10% is damaged?
A. Yes, sir.
Q. How do they separate them?
A. They count the good ones and deliver them and then the specks and then the slush afterwards.
Q. It was when the slush exceeded 10% of the cargo that you allowed an abandonment?
A. Yes, sir.
Q. Do you know whether the same method was followed in counting the slush on all the vessels?
A. As far as I know.
Q. When over ten per cent. it was for the benefit of the importer that you should be liberal in your estimates?
A. I did not make any estimates.

Mr. SMITH:

Q. Did you do anything more than look at the cargoes?
A. That is all.
Q. What commercial value has the slush?
A. None at all.

25 WILLIAM M. WILSON, recalled.

Mr. SMITH:

Q. Mr. Wilson, the conditions of the cargoes which you have spoken of refers to the time the vessel comes here to discharge?
A. Yes, sir, and while discharging.
Q. You are present while the hatches are open?
A. Yes, sir.
Q. Do cargoes come here in bad condition?
A. Yes, sir, very often.

Decree.

Filed July 17, 1899.

In the United States Circuit Court for the District of Maryland.

WILLIAM F. STONE, Collector,
vs.
MILTENBERGER LAWDER, PERCY M. LAWDER, and WILLIAM M. Lawder, Copartners Trading as Samuel M. Lawder & Sons.

This cause having been heard and duly considered, and it appearing to the court that the collector was not legally entitled to demand from the appellees the duty involved in this appeal,

It is adjudged, ordered and decreed by the court, this 17th day of July, 1899, that the decision of the board of general appraisers in the above-entitled case, by, and the same is hereby affirmed.

It is further adjudged, ordered and decreed that William F. Stone, collector, pay to Miltenberger Lawder, Percy M. Lawder and William W. Lawder, copartners, trading as Samuel M. Lawder & Sons,

the sum of two hundred and ninety-nine dollars, being the amount of duty illegally exacted by said collector on certain pineapples claimed to have been brought to the port of Baltimore by said Samuel M. Lawder & Sons, in the summer of 1897.

THOS. J. MORRIS,
District Judge.

26 *Petition of William F. Stone, Collector, for Appeal, Assignment of Errors, and Order of Court Allowing Appeal.*

Filed 5th August, 1899.

In the Circuit Court of the United States for the District of Maryland.

WILLIAM F. STONE, Collector of Customs, &c.,
vs.
MILTENBERGER LAWDER, PERCY M. LAWDER, and WILLIAM WARD LAWDER, Trading as S. M. Lawder & Sons.

To the honorable the judges of said court:

The petition of William F. Stone, collector of customs of the port of Baltimore, prays that the petitioner may be allowed an appeal to the United States circuit court of appeals for the fourth circuit, from the decree passed, and the judgment entered in pursuance thereof, in this case, on the 17th day of July, 1899, that a proper citation may be issued and served upon the said Miltenberger Lawder, Percy M. Lawder and William Ward Lawder, copartners, trading as Samuel M. Lawder & Sons, of Baltimore, or their attorney; and that the record of said decree and judgment, and all papers relating thereto, shall be transmitted to said United States circuit court of appeals for the fourth circuit, in order that said decree may be reviewed and reversed by said United States circuit court of appeals.

And the petitioner files herewith the following assignment of errors which he asserts exists in said decree and judgment, and which are intended to be urged in said United States circuit court of appeals.

The appellant will contend that the court below erred as follows:

1. In affirming the decision of the board of general appraisers.

2. In deciding that when pineapples, included in a single invoice are imported in bulk, any individual pineapple which may become so damaged during the voyage, and before entry, as to be entirely valueless and worthless, is to be deducted from the number of pine-

27 apples upon said invoice upon which the importer can be required to pay duty. In so deciding, this petitioner alleges that the court below erred in matter of law and the proper rule to be applied in such case is that an importation in bulk of pineapples, included in a single invoice, is to be considered a whole and that the importer thereof is entitled to no allowance for damage, injury or deterioration happening to any portion of the pineapples included in said invoice, except for such pineapples as *may*

be lawfully abandoned by said importer under the provisions of section 23 of the act of June 10, 1890.

3. In deciding that the condition of the imported merchandise is a material consideration in the assessment of duty thereon. In so deciding, your petitioner claims the court below erred in matter of law, and that merchandise actually, physically imported in any condition whatsoever is subject to duty, unless abandoned under the provisions of section 23 of the act of June 10, 1890.

4. In deciding that under protest No. 394 the number of pineapples imported by said S. M. Lawder & Sons was $952\frac{3}{12}$ dozen, when this petitioner says the number thereof imported was $1,179\frac{5}{12}$ dozen, and in deciding that under protest No. 399 the number of pineapples imported by the said S. M. Lawder & Sons was $23,959\frac{8}{12}$ dozen, when this petitioner says the true number imported by the said S. M. Lawder & Sons was $25,416\frac{4}{12}$ dozen; and in deciding that under protest No. 414 the number of pineapples imported by the said S. M. Lawder & Sons was $43,914\frac{9}{12}$ dozen, when this petitioner says the true number thereof imported by the said S. M. Lawder & Sons was $46,371\frac{6}{12}$ dozen; and that the said court further erred in deciding that under protest No. 415 the number of pineapples imported by the said S. M. Lawder & Sons was $53,137\frac{6}{12}$ dozen, when this petitioner says the true number thereof imported by the said S. M. Lawder & Sons was $54,776\frac{3}{12}$ dozen.

5. In deciding as matter of law that the entire invoice was not to be considered the unit of importation, but that each pineapple forming that invoice should be so considered.

6. In deciding that the value of pineapples imported at the port of importation, and not their actual market value or price in the principal market of the country whence imported to the United States, at the time of such exportation determines their liability to duty.

7. In deciding that the said S. M. Lawder & Sons are en-
28 titled to any allowance or abatement of duties because of damage amounting to the total destruction of the merchantable value of any portion of any invoice when such portion, the merchantable value of which was so destroyed, did not amount to 10% in value or quantity of the value or quantity of said invoice.

8. In passing a decree that William F. Stone, collector of customs of the port of Baltimore, shall pay to the appellees the sum of $299.

JOHN W. GRIGGS,
Attorney General of the United States.
By JOHN C. ROSE,
United States Attorney for the District of Maryland.

Let the appeal be allowed as prayed and citation issue.

THOS. J. MORRIS, *Judge.*

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Miltenberger Lawder, Percy M. Lawder, and William Ward Lawder, trading as S. M. Lawder & Sons, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond on the 9th day of September, next, pursuant to an appeal from a decree of the circuit court of the United States for the district of Maryland in your favor passed in a cause in said court wherein William F. Stone, collector of customs, district of Baltimore, Maryland, is appellant and plaintiff, and you are appellees and defendants to show cause, if any there be, why the decree rendered against the said appellant and plaintiff, in said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, this eleventh day of August, in the year of our Lord one thousand, eight hundred and ninety-nine.

THOS. J. MORRIS,
Judge U. S. Circuit Court, District of Maryland.

Served the within *the* citation on Miltenberger Lawder, Percy M. Lawder and William Ward Lawder, trading as S. M. Lawder & Sons, by delivering a true copy thereof to William Ward Lawder, one of the members of said firm of S. M. Lawder & Sons, at their place of business, No. 222 Light street, Baltimore, Md., this 14th day of August, 1899.

29 & 30

WILLIAM F. AIREY,
U. S. Marshal.

Order to Transmit Record.

And, thereupon, it is ordered by the court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States circuit court of appeals for the fourth circuit; and the same is transmitted accordingly.

Teste: JAS. W. CHEW, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

I, James W. Chew, clerk of the circuit court of the United States for the fourth circuit, in and for the district of Maryland, do hereby certify that the foregoing is a true transcript of the record and proceedings of the said circuit court, together with all things thereunto relating, in the therein-entitled cause.

Seal of the Court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, this 23rd day of August, A. D. 1899.

JAS. W. CHEW, *Clerk.*

31 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

W. F. STONE, Collector of Customs for the District of Baltimore, Md., Appellant,
vs.
MILTENBERGER LAWDER, PERCY M. LAWDER, and W. Ward Lawder, Trading as S. M. Lawder and Sons, Appellees.

No. 329. Appeal from the Circuit Court of the United States for the District of Maryland, Baltimore.

Aug. 26, 1898, transcript of record and cause docketed.

Same day, appearance of John C. Rose, U. S. att'y, for appellant, filed.

Aug. 31, 1899, appearance of John E. Semmes, for appellees, filed.

Sept. 22, 1899, twenty copies of printed record filed.

Oct. 5, 1899, appearance of Robert H. Smith for appellees filed.

Nov. 20, 1899, cause continued until the February term, 1900.

Feb. 12, 1900, (Feb. term, 1900,) cause came up to be heard, and was argued by counsel and submitted.

May 1, 1900, (May term, 1900), the court announced and filed its opinion, which is as follows, to wit:

32 *Opinion.*

United States Circuit Court of Appeals, Fourth Circuit.

WILLIAM F. STONE, Collector of Customs for the District of Baltimore, Maryland, Appellant,
vs.
MILTENBERGER LAWDER, PERCY M. LAWDER, and W. Ward Lawder, Part-ers Trading as S. M. Lawder & Sons, Appellees.

No. 329. Appeal from the Circuit Court *for* the United States for the District of Maryland.

(Argued Feb. 19, 1900; decided May 1, 1900.)

Heard by Goff and Simonton, circuit judges.

John C. Rose, U. S. attorney for the appellant, and Robert H. Smith and John E. Semmes, for the appellees.

GOFF, *Circuit Judge:*

S. M. Lawder & Sons, fruit importers, during the year 1897, imported a number of cargoes of pineapples, in bulk, from Governor's harbor, B. W. I., to the port of Baltimore. On the discharge of the cargoes it was found that a number of the pineapples were decayed, and that they had gone into what the customs officers called "slush,"

having thereby entirely lost their commercial value. The collector assessed duty on the entire amount of the pineapples, no matter as to the condition they were in when they were brought into the port. The importers protested, claiming that they were not liable for the duty on the pineapples that had gone into slush before the cargo was landed. The board of general appraisers reversed the action of the collector, and held that the importers were not required to pay duty on such decayed and worthless pineapples. The collector then appealed from such decision of the board of general appraisers, to the United States circuit court for the district of Maryland, which affirmed said decision, and from the decree of that court so affirming such decision this appeal is prosecuted.

At the time of such importations the duty on pineapples was 25 per cent. ad valorem. The number of pineapples destroyed by
33 decay in the importations in controversy was less in each cargo than 10 per cent. of the whole amount of the invoice. The appellant insists that, as the importers could not abandon all or any portion of the said importations to the United States, and could not claim an allowance for damages because of the decay of said pineapples, that the duty as first assessed by the collector was proper. The contention of the appellant is that sec. 23 of chap. 407 of the Acts of 1890, approved June 10, 1890, (supplement to the Revised Statutes, page 754,) applies to the importations in question. That section is as follows: "That no allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon. But the importer thereof may, within ten days after entry, abandon to the United States all or any portion of the goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned; provided: that the portion so abandoned shall amount to ten per centum or over of the total value or quantity of the invoice; and the property so abandoned shall be sold by public auction or otherwise disposed of for the account and credit of the United States under such regulations as the Secretary of the Treasury may prescribe."

Is it not beyond question that the claim of the appellees in this case is a claim for an allowance for damage to the merchandise imported by them? Is it not equally clear that, under the section of the act of Congress we have quoted, all such allowances as to importations like this are prohibited? Under former tariff acts and the decisions of the courts relating thereto, such allowances were proper, and were frequently made Mariott *v.* Brune, 9 How., 619; U. S. *v.* Southmayd, *id.*, 637; Weaver *v.* Saltonstall, 38 Fed. Rep., 493. It is the natural inference that it was because of the many claims for damages so presented, and the persistent efforts so continuously being made for an abatement of duties, that the necessity for the changes in the legislation referring thereto, which was made in the tariff-administration act of 1890 (the said section 23 we have mentioned), was suggested to Congress. By that section a radical change was made and all allowances for damages to goods, wares and merchandise imported into the United States were absolutely

prohibited. But in lieu of the damages theretofore allowed, the importer was himself to determine what goods were damaged, by abandoning all, or any portion of the same, thereby relieving himself of the duties on the portion so abandoned, provided that portion amounted to ten per centum or over of the total value
34 or quantity of the invoice. The word "damage," as used in said section, has its ordinary signification, and covers, we think, all claims founded on injurious changes in the condition of the articles imported, occurring after they leave the place of shipment and before they reach the port of discharge. It will be noted that the portion abandoned must amount to ten per centum or over of the total value or quantity of the invoice and not of the goods, wares and merchandise as discharged at the port of entry. The words of the section we are considering seem to have been used for the purpose of meeting the language of the courts in construing former acts relating to the same matter, and were clearly intended to compel the importer to pay the duties on his importation, unless a portion of the same amounting to ten per centum or over of the total value or quantity of the invoice shall be abandoned to the United States, in which event he was to be relieved of the duty on the part so abandoned, which might be all of, a greater portion of, or a comparatively small part of the total importation.

This question was before the circuit court of appeals for the second circuit, and that court, in disposing of it, used this language: "This section prohibited allowance for damage, unless, within a specified time, the importer should abandon to the United States his damaged goods, in which event he would be relieved from payment of the duties on the portion so abandoned, provided it amounted to ten per centum or over of the total amount or quantity of the invoice. This provision is also general. It prescribes the prerequisites for damage allowance, and is applicable to all articles, except those which are or may be specially excepted, as is now the case, with respect to damage upon imported wines and liquors. It is not to be supposed that it was the intention of the legislature to take one article out of the general system, unless such intention is clearly manifest. The mere statutory provision by which imported broken glass is duty free does not, in our opinion, modify the system in respect to the article of damaged glass."

"The case of Mariott *v.* Brune, 9 Howard, 619, Lawrence *v.* Caswell, 13 Howard, 488, and United States *v.* Nash, 4 Cliff., 107, in which it was held that, if the quantity or the weight stated in the invoice had been diminished by leakage or by loss on the voyage, the duty is chargeable on the quantity or the weight actually imported are not conclusive with respect to the duties to be im-
35 posed upon the damaged goods where the allowance for damage is specially regulated by statute. United States *v.* Bache *et al.*, 59 Fed., 762."

We do not find it necessary to consider in detail the testimony relating to the method resorted to by the customs officers for the purpose of ascertaining whether or not the quantity of decayed pineapples amounted to ten per centum of the invoice, as the insist-

ence of the appellees is in fact based on their right to exclude entirely the whole quantity of "slush," on the theory that the same was not in fact imported into the United States. This contention cannot, in our opinion, be sustained, as under existing law an importation in bulk of pineapples included in a single invoice, must be considered as a whole, and the importer thereof is entitled to no allowance for damage or deterioration to or concerning the same, and must pay duty on the entire invoice, unless a portion of the same is abandoned by him under the provisions of section 23 of the act of June 10, 1890.

We find that there is error in the decree complained of, and therefore the same will be reversed, and this cause will be remanded with instructions that such further proceedings be had therein as are indicated by this opinion.

Reversed.

May 5, 1900, (same term) the court made and entered the following decree, to wit:

Decree.

Filed May 5, 1900.

United States Circuit Court of Appeals, Fourth Circuit.

WILLIAM F. STONE, Collector of Customs for the District of Baltimore, Maryland, Appellant, *vs.* MILTENBERGER LAWDER, PERCY M. Lawder, and W. Ward Lawder, Partners Trading as S. M. Lawder & Sons, Appellees.	No. 329. Appeal from the Circuit — of the United States for the District of Maryland.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged
36 and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, reversed, with costs; and this cause is remanded to the circuit court of the United States for the district of Maryland, at Baltimore, with instructions that such further proceedings be had therein as are indicated by the opinion of this court.

NATHAN GOFF.

May 5, 1900.

May 26, 1900, mandate issued and transmitted to clerk U. S. circuit court, at Baltimore, Md.

Clerk's Certificate.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for fourth circuit, do certify that the aforegoing is a true copy of the entire record and proceedings in the therein-entitled cause as the same remains upon the records and files of the said circuit court of appeals.

In testimony whereof I have hereto set my hand and affixed the seal of the said United States circuit court of appeals for the fourth circuit, at Richmond, on this 9th day of April, A. D. 1901.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which William F. Stone, collector of customs for the district of Baltimore, Maryland, is appellant, and Miltenberger Lawder, Percy M. Lawder, and W. Ward Lawder, partners, trading as S. M. Lawder & Sons, are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of Maryland, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
38 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of May, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

39 [Endorsed:] File No. 18,117 Supreme Court of the United States. No. 632, October term, 1900. Miltenberger Lawder *et al., vs.* William F. Stone, collector &c. Writ of certiorari. The execution of the within writ appears from the schedules hereunto annexed. Henry T. Meloney c'k U. S. cir. court appeals 4th circuit.

40 UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do make return of the annexed writ of certiorari issued out of the supreme court on the — day of May 1901, by annexing hereto a certified copy of the stipulation of the attorneys of record stipulating that the certified transcript of the record of the said cause filed in the clerk's office of the said Supreme Court of the United States, shall be taken and considered as a return to the writ of certiorari aforesaid.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals for the fourth circuit, at Richmond, on this 24 day of May, A. D. 1901.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals for the Fourth Circuit.

41 United States Circuit Court of Appeals, Fourth Circuit.

WILLIAM F. STONE, Collector of Customs for the District of Maryland, Appellant,
vs.
MILTENBERGER LAWDER, PERCY M. LAWDER, and W. Ward Lawder, Copartners Trading as S. M. Lawder & Sons, Appellees.
} Stipulation.

It is hereby stipulated, consented and agreed that the certified transcript of record in this cause now on file in the clerk's office of the Supreme Court of the United States, be taken and considered as a return to the writ of certiorari issued out of the Supreme Court of the United States on the 1st day of May, 1901, in the above-entitled cause, to the judges of the United States circuit court of appeals for the fourth circuit.

Dated May 2nd, 1901.

EDWARD S. HATCH,
Solicitor for Petitioners for Writ.
J. K. RICHARDS,
Solicitor General.

42 UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the annexed stipulation of counsel is a true copy of the original filed and now remaining among the records and files of the said circuit court of appeals in the therein-entitled cause.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals, at Richmond, on this 24 day of May, A. D. 1901.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

43 [Endorsed:] File No. 18,117. Supreme Court U. S. October term, 1901. Term No. 298. Miltenberger Lawder *et al.* petitioners, *vs.* Wm. F. Stone coll'r &c. Writ of certiorari and return. Filed June 21, 1901.

Office Supreme Court U.S.
FILED
APR 15 1901
JAMES H. McKENNEY,
Clerk

No. 632.

632

Br. of Mates for Petitioner.

IN THE

SUPREME COURT

OF THE UNITED STATES.

Filed April 15, 1901.

IN THE MATTER OF THE APPLICATION

of

WILLIAM F. STONE, COLLECTOR OF CUSTOMS FOR THE DISTRICT OF BALTIMORE, MARYLAND,

Respondent herein,

against

MILTENBERGER LAWDER, PERCY M. LAWDER AND W. WARD LAWDER, COPARTNERS, TRADING AS S. M. LAWDER & SONS,

Petitioners herein.

PETITION FOR WRIT OF CERTIORARI.

EDWARD S. HATCH,
Counsel for Petitioners,
100 Broadway,
Borough of Manhattan,
New York City.

HAMILTON PRINT, 12 BARCLAY STREET, N. Y. TELEPHONE, 3573 CORT.

1

In the Supreme Court

OF THE UNITED STATES.

In the Matter of the Application of

WILLIAM F. STONE, Collector of Customs for the District of Baltimore, Maryland,

Respondent herein,

against

MILTENBERGER LAWDER, PERCY M. Lawder and W. Ward Lawder, copartners, trading as S. M. Lawder & Sons,

Petitioners herein.

2

PETITION OF MILTENBERGER LAWDER, PERCY M. LAWDER AND W. WARD LAWDER FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT, IN THE ABOVE-ENTITLED MATTER. 3

To the Honorable the Supreme Court of the United States:

The petition of Miltenberger Lawder, Percy M. Lawder and W. Ward Lawder respectfully shows to the Court:

4 That the petitioners are fruit importers, trading under the name of S. M. Lawder & Sons. During the spring or early summer of 1897 they imported several cargoes of pineapples from Governor's Harbor, B. W. I., to the Port of Baltimore, invoiced as a certain number of dozens. At that time the Tariff Act of 1894 was in effect, under which pineapples were subject to a duty of 20% *ad valorem*.

Upon the discharge of the cargoes, at Baltimore, after the pineapples had been taken out, there remained, in the holds of the ships, a mass of decaying slush and pineapple tops, mixed with bilge water and other debris of the cargo, which the customs inspect-
5 ors reckoned and counted as part of the cargo, and on which the duty of 20% was assessed. This mass of slush, being a menace to public health, was shovelled onto a scow, taken down the river and dumped overboard. The pineapples alleged by the inspectors to be contained in this slush were absolutely uncountable, and their number was roughly estimated by the inspectors. The number so estimated was less than 10% of the total invoice, and the Collector claiming it to be a case of damage to the cargo, within the meaning of Section 23 of the Customs Administrative Act of June 10, 1890, assessed duty on the whole number of pineapples estimated by
6 the inspectors to be contained in the cargo, which included the pineapples so destroyed. This quantity of slush was commercially valueless.

The importers duly protested against the payment of duty on such pineapples as were not landed or received by them but were estimated by the inspectors to be contained in this worthless matter. The Board of General Appraisers reversed the action of the Collector, and handed down an opinion, by General Appraiser Somerville, dated July 26th, 1898, holding that the importers were not liable to the

payment of duty on the portion of the cargo that 7
had been destroyed in *transitu*.

The Collector thereupon appealed from the decision of the Board of General Appraisers, to the United States Circuit Court for the District of Maryland, which, after a hearing before District Judge Morris, affirmed the decision of the Board of General Appraisers, by its decree duly filed the 17th day of July, 1899.

From the decree of the Circuit Court the Collector appealed to the United States Circuit Court of Appeals in the Fourth Circuit, which, on May 1st, 1900, rendered a decision reversing the decision appealed from, and affirming the action of the Collector. 8

The precise proposition involved in this case, presented to and passed upon by the United States Circuit Court of Appeals, was whether the pineapples thus destroyed should be treated as never having been imported, or as a damaged part of the cargo and within the provisions of Section 23 of Chapter 407 of the Act of June 10th, 1890, which provides:

> "That no allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon; 9
> but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice and be relieved from the payment of the duties on the portion so abandoned; provided that the portion so abandoned shall amount to ten per centum, or over, of the total value or quantity of the invoice; and the portion so abandoned shall be sold by public auction or otherwise disposed of for the account and credit

10 of the United States under such regulations as the Secretary of the Treasury may prescribe."

The Collector decided that the importations came within the foregoing section, and the decision of the United States Circuit Court of Appeals has affirmed the Collector's action.

The petitioners concede that the number of pineapples on which the duty was assessed was shipped from the port of exportation, and was originally part of the cargo. But they contend that the Government does not base its right to collect duties on the fact that goods have been shipped from a foreign port,
11 destined for a port of the United States, and that the only foundation for the imposition of a duty is that the goods are brought into this country for consumption here. If the portion of the cargo destroyed had been thrown overboard before the ship arrived, there could be no question of payment of duty. And should a different rule be applied because it was inexpedient or impossible to separate the worthless portion of the cargo before reaching port? It could not have been the intention of Congress to demand from an importer a duty on goods never brought into this country. And goods having no physical existence,
12 in species, and no identity, and having lost all resemblance to their original form, and which, on arrival, are in such a condition that they cannot be discharged in any port, cannot be classed as goods brought into this country.

In deciding this case under Section 23 of the Act of June 10th, 1890, it is submitted that the Court overlooked the well settled rule that duty shall only be paid on the quantity of goods actually imported, or as stated in S.S. 12184, "the Tariff Act prescibes rates of duty to be exacted on articles 'imported from foreign countries'; but no merchandise which

does not arrive in a port of entry can be treated as 13
imported." It is conceded that if the pineapples were brought into the country in a damaged condition, so that they were reduced in value, being less than 10% of the whole invoice, they would be subject to the duty. But the number of pineapples received was several thousand less than the number stated on the invoice, and the Collector accounted for the missing number as being contained in a mass of decaying vegetable matter, bilge water and other debris taken from the hold of the ship, and collected duty on that worthless mass as pineapples imported into the United States.

An "imported" article, as the the word is used 14
in the tariff act, is defined as an article brought or carried into this country from abroad. The actual quantity of merchandise imported determines the amount of duty, and not the original quantity bought and shipped. The pineapples that had been reduced to slush had ceased to be merchandise of any kind before the cargo arrived at the port of entry.

In the case of goods that by reason of inherent qualities have become altered in character during a voyage, so that their value is increased, it is well settled that duty will be assessed on the increased value (Reiss *v.* Magone, 39 Fed., 105). 15

In importations of this character it is the practice of the Government in assessing the duty to count the number of pineapples contained in the cargo. And in these importations the duty was assessed, not on the quantity in bulk as called for by the invoice, but on the number of pineapples actually received, as counted by the inspectors, and in addition, the number estimated by the inspectors to be contained in the slush. Without doubt, if the number so estimated by the inspectors to have been con-

16 tained in the cargo had exceeded the number called for by the invoice, the importers would have been called upon to pay duty on such estimated increased amount of cargo.

In T. D. 21525 the same rule is stated, that "it is well settled in the construction of the tariff act that duties shall be imposed only on the quantity of merchandise actually imported, and not necessarily upon that specified in the entry, even though the invoiced quantity exceeds the actual amount."

On this same point the United States Supreme Court has said, in the case of Marriott *v.* Brune (9 How., 619):

17 "The general principle applicable to such a case would seem to be that revenue should be collected only from the quantity or weight which arrives here. That is, what is imported—for nothing is imported till it comes within the limits of a port. * * * As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the Custom House; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are
18 unable to see any principle of public policy which requires the words of the Act of Congress to be extended so as to embrace more. * * *

"It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. * * *

"Consequently, where a portion of the shipment in cases like these does not arrive here, and hence does not come under the pos-

session and cognizance of the Custom House officers, it cannot, as heretofore shown, be taxed on any ground of law, or of truth and propriety, and does not, therefore, require for its exemption any positive enactment by Congress.

> "Such is the case of a portion being lost by perils of the sea, or by being thrown overboard to save the ship, or by fire, or piracy, or larceny, or barratry, or a sale and delivery on the voyage, or by natural decay. If there be a material loss, it can make no difference to the sufferer or the Government whether it happened by natural or artificial causes. In either case, the article to that extent is not here to be assessed, nor to be of any value to the owner."

After referring to cases in which duties had been refunded or remitted where the goods actually arrived here and were destroyed by fire before the packages had been opened and entered into the consumption of the country, the Court said:

> "But much more should duties not be exacted on what was lost or destroyed on its way hither, and which never came even into the possession or control of the Custom House officers, and much less into the use of the community."

The decision in Marriott *v.* Brune was affirmed in United States *v.* Southmayd, 9 How., 637, and in the latter case it was also held that the fact that the seller of sugars abroad takes into consideration the probable loss from damage during the voyage does not justify the Collector in our ports in charging a duty upon the portion thus lost; that the duty must be assessed upon what arrives in this country, and

not upon what was purchased abroad. The Court said:

> "The duty here is regulated by law, and not by any estimates of such a character by men of business; and by law it is imposed on the quantity entered here, and not the quantity shipped abroad; and on the true price abroad as estimated by the appraisers, and not necessarily as estimated by the owners."

In Balfour *v.* Sullivan, 17 Fed., 231, it was said:

> "Duties are levied under the statute, and
> "the decision of the Supreme Court construing the statute, upon the amount of goods
> "pactually imorted."

In that case a cargo of coke, imported from Wales, by reason of evaporation of the moisture contained in it during the voyage, weighed several tons less when received than when shipped. It was held that duties could only be legally collected on the actual weight at the time of importation, and not on the weight shown by the invoice.

And in Lawrence *v.* Caswell, 13 How., 488, it was held that a duty of 100% *ad valorem* upon brandy ought to be charged only upon the quantity actually imported, and not on the contents stated in the invoices.

The question was also considered and decided in the case of Weaver & Sterry *v.* Saltonstall, 38 Fed., 493. In that case the plaintiffs imported into the port of Boston, from Italy, 1,800 boxes of castile soap. After its arrival and entry at the custom house the soap was submitted to an examination by a weigher, who reported the weight to be 70,286 pounds, while the invoice made at the time of the shipment of the soap from Italy showed the weight at the time of exportation to have been 92,983

pounds. The plaintiffs claimed that duty should 25
have been exacted only upon the value and amount as shown by the weigher's return to have been actually imported, but duty was imposed upon the entire value and amount as stated in the invoice to have been shipped. The action was brought to recover the excess of duties so exacted by the Collector. Judge Colt, in his opinion, said:

> "It seems to me that the courts have determined this question in favor of the importer. In principle I cannot distinguish this case from Marriott *v.* Brune, 9 How., 619; U. S. *v.* Southmayd, *Id.*, 637; Austin *v.* Peaslee, 20 Law Rep., 443. * * * In Mar- 26
> riott *v.* Brune it was held that the true construction of the law is to assess duty only upon the quantity of sugar and molasses which arrives in port, and not upon the quantity which appears by the invoice to have been shipped. This doctrine was affirmed in U. S. *v.* Southmayd and in Austin v. Peaslee. The last paragraph of Section 2900, Rev. St., forbidding the assessment of duties upon an amount less than the invoice value, is substantially the same as the proviso contained in Section 9 of the Act of 1846 (9 St. at Large, 43). In Marriott *v.* Brune it 27
> is held that the decision is not inconsistent with the proviso in Section 9 of the Act of 1846, because the proviso refers only to the price, and not to the quantity. Such being the construction put upon the law by the Supreme Court and the Circuit Court of this circuit, the Collector should have assessed duties only upon the quantity of soap which arrived in port, and not upon the quantity which appears by the invoice to have been shipped; and the plaintiff is entitled to a

judgment for the excess of duties so exacted. Judgment for plaintiff."

In American Sugar Refining Co. *v.* United States, 91 Fed., 646 (January 21st, 1899), it was shown that a cargo of moist or green sugar imported from Brazil had decreased in weight from drainage and evaporation at the time it reached the port of entry, thereby increasing the market value per pound. The General Appraisers decided that in determining the market value of the sugar such increase in value should be considered, and duty assessed accordingly. In affirming the decision of the General Appraisers the United States Circuit Court for the Southern District of New York said:

> "Owing to drainage, there are less pounds of sugar on arrival here than when the ship left Brazil, but the cargo is actually worth as much as when it started. It appears, therefore, that, if the sugar had been kept for the same length of time in Brazil, the same loss in weight by drainage and increase in value per pound would have taken place there, and the value of the cargo as a whole would not have been affected thereby. If this be so I do not think the importers should gain by the decrease in weight coupled with an increase in value per pound. * * * This construction is supported by the statement of Mr. Justice Curtis in Austin *v.* Peaslee (2 Fed. Cas., 235), that 'the merchant is to pay duties on what is actually imported, not what is put up for export in the foreign country'; and of Judge Colt in Weaver *v.* Saltonstall, 38 Fed., 483, that the true construction of the law is to assess duty only upon the quantity which arrives in port, and not upon the quantity which appears by the invoice to have been shipped. * * * ."

It is submitted that this is a case of loss by acci- 31
dent during the voyage, and not a case of damage under Section 10 of the Act of 1890, and is properly to be considered as within the provisions of Article 922 of the Customs Regulations of 1892, which provides:

> "No allowance will be made in the estimate of duties for lost or missing packages appearing on the invoice, unless shown by proof satisfactory to the Collector and naval officer not to have been originally laden on board, or to have been lost or destroyed by accident during the voyage."

32

There is no question but that all the facts in relation to the importations were before the Collector.

There is no definition of the word damage that would include a total destruction of value. A mass of slush, even though containing a quantity of pineapple tops, cannot correctly be called a lot of damaged pineapples. There is nothing to point out to which damage has been done. There is no original article lessened in value, as is necessarily implied in the term "damaged." A cargo reduced in quantity or amount is not a damaged cargo. On such of the cargo as had actual existence, and was actually landed at the port of Baltimore, no claim 33
is made for a refund of duty.

The intent of Congress was plainly to use the word "damage" according to the accepted and ordinary definition, and not as having any technical meaning. The section provides that no allowance shall be made for damage to goods, etc., imported into the United States, but that the importer may abandon to the Government the cargo, or any part of it, provided that the abandoned portion shall amount to 10% or more of the whole invoice, to be sold or disposed of for the account and credit of the

Government. No claim is made here for damage to goods "imported into the United States," to bring it within this section, nor on any damaged goods that could be abandoned to the Government. Reading the entire section, the intent obviously was that the subject of an abandonment should be something that could be disposed of for the account of the Government, something of value, and that had been, to a greater or less degree, reduced in value. A thing totally destroyed and utterly valueless could hardly have been intended to be abandoned to the Government as a source of revenue. To constitute damaged pineapples there must be pineapples in existence to be damaged. To constitute an absolute loss of the goods absolute annihilation was not essential. The form and species and entire value of the pineapples had been destroyed. The duty imposed is 20% on the value of pineapples, and where the pineapples have ceased to exist, and ceased to have any value, there is nothing on which duty can be assessed.

In the matter of Thomas B. Schall, G. A., 656, decided by the Board of General Appraisers June 6th, 1891, the point here presented was considered. In a cargo of oranges the number delivered fell short 35,700, and a quantity of "rots and slush" was brought on deck and removed within twenty-four hours, in accordance with the health regulations of the City of Baltimore. The Collector and naval officer reported that he was satisfied by proof that the oranges became rotten and worthless on the voyage, and never went into consumption. It was held that it was proper for the Collector to make allowance therefor in the liquidation of duty upon the entry, citing Article 609 of the General Regulations (now Article 922 of the Customs Regulations of 1892), providing that an allowance should be made for lost or missing articles when it is satis-

factorily proved to the Collector and naval officer 37
that they were lost or destroyed by accident during the voyage. The Board said: "Loss of fruit by "decay may reasonably be held to be an acci- "dent, it being a loss by a contingency, chance or "casualty."

The precise question involved in the pending case was considered and decided in the case of Shaw *v.* Dix, 72 Fed. Rep., 106.

In that case the importers brought into the port of Baltimore two cargoes of cocoanuts in bulk, invoiced at specified prices per thousand. When the cargo was discharged the number of cocoanuts fell short of the number invoiced, and the shortage the 38
Government officers estimated to be contained in a mass of broken and rotten cocoanuts, not countable, and of no value, and the importers were required to have it carted off and thrown away.

The Collector assessed duty on the whole number of cocoanuts specified in the invoices, deciding that Section 23 of the Act of June 10th, 1890, was applicable, and that the shortage was a damage to the merchandise for which no allowance could be made, as it did not amount to 10%, and relying on the decision in U. S. *v.* Bache, 59 Fed. Rep., 762.

The Board of General Appraisers reversed the action of the Collector, and on an appeal to the 39
United States Circuit Court for the District of Maryland the decision of the Board of General Appraisers was sustained. Judge Morris, in his opinion, says:

> "It is quite true that the allowance for damage to imported goods is expressly regulated by Section 23 of the Act of June 10th, 1890, but it is true now, as it was before that Act was passed, that duty is not to be assessed on an article which does not ar-

40 rive in this country (citing Marriott *v.* Brune, 9 How., 619). As to perishable fruits imported in boxes, cases or bags, and of which some in each package decay during the voyage, it may be held that the loss cannot be ascertained except by an estimate of the loss of value to each package by the decay of some of its contents, and as the invoice would call for so many packages, it might fairly be said that all the packages were imported, but in a damaged condition and of an impaired value. In such a case, no doubt, Section 23 would apply. But if any packages were broken up
41 and the contents reduced to a worthless mass, it could not be fairly said that those packages arrived at all, or that duty could be exacted in respect to them. With respect to cocoanuts imported in bulk, it would appear that those which rotted and were broken up on the voyage and become mere worthless debris in the hold of the ship, are a total loss. They are not a damage to the value of what remains, but they lessen the number which the importer receives. If this worthless material could be separated from the cargo while at sea and thrown overboard, the importer
42 would be better of, because he would be saved the expense of having the stuff hauled away to the dump after the cargo is discharged."

In distinguishing that case from U. S. *v.* Bache, relied on by the Collector, Judge Morris says:

> "In U. S. *v.* Bache, 59 Fed. Rep., 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed,

but were damaged. It was clearly a case 43
within the language of Section 23, and no question would have arisen but for the fact that broken 'glass fit only to be remanufactured,' was by law exempt from duty and admitted free. The importer claimed that as during the voyage a portion of each case became broken glass, its character as merchandise was changed and it became an article specifically exempted from duty, and entitled to come in free, and that it made no difference that the dutiable and nondutiable goods happened to come into this country in the same box. He claimed that he was chargeable with duty on 44
the merchandise as it came into this country, and not as it was when it was put aboard the ship in the foreign port. It was held by the Circuit Court of Appeals for the Second Circuit that Congress having enacted a general statutory system for the ascertainment of the damage to imported goods and for allowance in respect to such damage, it could not be supposed that damages to importations of glass were to be exempted out of that general system simply because importations of broken glass had been put on the free list, and held that there was nothing indicating an intention by Congress to take the one article of 45
glass out of the general system."

And in discussing the question of what would constitute a proper subject of abandonment, it was said:

> "I think it is clear that the Board of General Appraisers was right in holding, in deciding the present case, that this section contemplated a case where there remains something to be abandoned, in the sense of being im-

46 paired in value, but that it is not applicable to a case where specific items of the invoice have been so entirely destroyed as that, in reckoning up to the items of the invoice, they cannot be counted, and when the destroyed items are valueless, and there remains nothing which can be the subject of abandonment. Section 23 of the Act of 1890 is not inconsistent with the general provisions of Section 2921 of the Revised Statutes, nor with Sections 906 and 922 of the General Regulations, providing that, if the quantity which arrives is less than the invoice, there
47 can be an allowance for the deficiency. In the present case it was not possible for the appraisers to say what number of cocoanuts was contained in the mass of debris remaining after the discharge of the cargo. It was estimated that this mass contained the difference between the number discharged and the number stated in the invoice. But the number specified in the invoice is not the result of an accurate count, the nuts being often brought on board in small boats, through the surf, so that it is not possible to say with any accuracy what
48 number the mass of debris did represent. It is quite manifest that there is no ground for the contention that Section 23 is applicable to this case. The decision of the Board of General Appraisers is sustained."

Your petitioners, therefore, contend that the Circuit Court of Appeals erred in holding that the destruction of part of the cargo should be treated as a case of damage to the cargo, and that your petitioners were liable for duties on pineapples not re-

ceived by them and not entered, and which were a 49
total loss before arriving at the port of entry.

The point is one frequently arrising in relation to importations into the port of Baltimore, as well as other ports in the United States, and your petitioners submit that it is of the utmost importance to the importers, and will as well be of the greatest assistence to the collectors, that there should be a final adjudication of this Court, determining whether articles that by reason of destruction in transit are never brought into the United States, and never received by the importer, should nevertheless be subject to a duty as damaged merchandise. 50

Your petitioners present herewith to this Court and file a duly certified copy of the entire record of the lower Court in the case, as the same appears in the United States Circuit Court of Appeals, and pray that the writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals of the United States for the Fourth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals in the above-entitled action, to the end that this said case may 51
be reviewed and determined by this Court as provided by Section 6 of the Act of Congress entitled "An Act to establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891."

And your petitioners pray that the said judgment of said Circuit Court of Appeals be reversed and the cause remanded, with instructions to enter

52 a judgment in favor of your petitioners and against William F. Stone, Collector, etc.

And your petitioners will ever pray, etc.

PERCY M. LAWDER,
MILTENBERGER LAWDER,
W. WARD LAWDER,
Petitioners.

Edw. S. Hatch

Counsel for Petitioners,
100 Broadway,
53 New York City.

UNITED STATES OF AMERICA,
District of Maryland,
City of Baltimore, } ss.:

PERCY M. LAWDER, being duly sworn, says: That he is a member of the firm of S. M. Lawder & Sons, and one of the petitioners above named, and subscribed the foregoing petition. That he has read the foregoing petition and knows the contents thereof, and the facts therein stated are true to the knowledge of deponent.

54

PERCY M. LAWDER.

Sworn to before me this 2d day of April, 1901.

N. F. BURKE,
Notary Public.

Certificate of Counsel.

I hereby certify that I have carefully examined the foregoing petition and application for a writ of certiorari, and that in my opinion the same is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

EDW. S. HATCH,
Counsel for Petitioner.

To

JOHN S. ROSE, Esq.,
United States Attorney for the District of Maryland.

Please take notice, that on the 22d day of April, 1901, on the opening of court, or as soon thereafter as the matter can be heard, I shall move the Supreme Court of the United States, at the court-room thereof, in the City of Washington, D. C., that the foregoing petition for a writ of certiorari be granted.

Dated New York, April 3d, 1901.

EDW. S. HATCH,
Counsel for Petitioner.

Service of above notice and receipt of a copy thereof, together with copy of the petition, are hereby admitted at Baltimore, Md., this 6th day of April, 1901.

John C. Rose
U. S. Attorney for the
District of Maryland.

Supreme Court, U.S.
FILED
NOV 1 1902
JAMES H. McKENNEY,
Clerk.

No. 82.

Br. of Hatch for Appellants.

Filed Nov. 1, 1902.

Supreme Court of the United States.

82

MILTENBERGER LAWDER, PERCY M. LAWDER and W. WARD LAWDER, Co-partners Trading as S. M. LAWDER & SONS,

Appellants,

against

WILLIAM F. STONE, Collector of Customs for the District of Baltimore, Maryland,

Appellee.

BRIEF FOR APPELLANTS.

EDWARD S. HATCH,
Counsel for Appellants,
100 Broadway,
New York City.

In the Supreme Court of the United States.

MILTENBERGER LAWDER, PERCY M. LAWDER and W. WARD LAWDER, co-partners trading as S. M. LAWDER & SONS,
Appellants,

against

WILLIAM F. STONE, Collector of Customs for the District of Baltimore, Maryland,
Appellee.

Brief for Appellants.

This matter was brought into this Court from the United States Circuit Court of Appeals, for the Fourth Circuit, on a writ of certiorari, duly issued out of this Court on the first day of May, 1901.

The appellants are importers of fruit, trading under their firm name of S. M. Lawder & Sons. During the early part of the year 1897 they imported into the Port of Baltimore, from Governor's Harbor, B. W. I., several cargoes of pineapples, invoiced as a specified number of dozens. At that time the Tariff Act of 1894 was in effect, under paragraph 213 1/2 of which pineapples were subject to a duty of twenty per cent. *ad valorem.*

Upon the discharge of the cargo at Baltimore, after the pineapples had been taken out of the vessels and their number estimated by the inspectors, there remained in the holds a quantity of what was described as "slush," consisting of decomposed vegetable matter, mixed with bilge water and other *débris* of the cargo, some of it in a semi-liquid condition. This slush was brought up from the holds in baskets and included by the inspectors in their appraisement of the cargoes. The pineapples alleged to be contained in the slush were uncountable, and their number was roughly estimated by the inspectors by counting the pineapple tops and buts contained in a number of baskets of the slush, striking an average of those baskets, and then calculating the number contained in the whole quantity of slush according to that average (pp. 16–21 of the Record). The material thus removed from the vessels was commercially valueless, and under the sanitary regulations of the City of Baltimore was taken down the river on a scow and dumped overboard. The number of pineapples so estimated by the inspectors to be contained in the slush was less than ten per cent. of the total invoice, and the collector treated the loss as a case of damage to the cargo within the meaning of Section 23 of the Customs Administrative Act of June 10, 1890, and assessed duty on the whole number of pineapples estimated by the inspectors to be contained in the cargoes, including this quantity of slush.

The importers duly protested against the payment of duty on such pineapples as were not received by them, or actually brought into port, but which were returned by the inspectors as contained in this worthless and indistinguishable mass, that never was even landed.

The Board of United States General Appraisers sustained the protests and handed down an opinion (pp. 12–13) by General Appraiser Somerville, dated July

26th, 1898, holding that the loss should be treated as a short shipment, and that the importers were not liable to the payment of duty on the portion of the cargo that had been so destroyed and could not be landed.

The collector thereupon appealed from the decision of the Board of General Appraisers to the United States Circuit Court for the District of Maryland. By an order duly made by that Court on February 21st, 1899 (p. 14), on application of the Collector, it was referred to Hon. T. S. Sharretts, one of the Board of United States General Appraisers, to take and return to the court such further evidence as might be offered upon behalf of the collector. The collector proceeded to take testimony under said order as to the manner of estimating the number of pineapples alleged to be contained in such "slush," and the manner in which such loss had theretofore been treated (pp. 16–25).

After the return of such testimony, and a hearing duly had before District Judge Morris, the United States Circuit Court, by a decree filed July 17th, 1899, affirmed the decision of the Board of General Appraisers.

From such decree of the Circuit Court the Collector appealed to the United States Circuit Court of Appeals in the Fourth Circuit, which Court, on May 1st, 1900, rendered its decision reversing the decision of the United States Circuit Court and the Board of General Appraisers which had sustained the protests, and by its decision affirmed the action of the Collector.

To obtain a review of the decision of the United States Circuit Court of Appeals the importers duly petitioned this Court for a writ of certiorari, on the particular ground that the Circuit Court of Appeals erred in holding that the destruction of part of the cargoes should be treated as a case of damage to such

cargo, and in holding that the importers were liable for duties on pineapples not received by them and not landed, and which had become a total loss before arriving at the port of entry.

POINTS.

I.

The claim of the importers is for a refund of duties assessed on pineapples that were never actually imported, and not a claim on damaged merchandise.

Section 23 of Chapter 407 of the Act of June 10th, 1890, under which the Collector assessed and collected the duty in this case is as follows :

> "That no allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon ; but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice and be relieved from the payment of the duties on the portion so abandoned ; provided that the portion so abandoned shall amount to ten per centum, or over, of the total value or quantity of the invoice ; and the portion so abandoned shall be sold by public auction or otherwise disposed of for the account and credit of the United States under such regulations as the Secretary of the Treasury may prescribe."

The importers' sole claim is for refund of duty paid on "pineapples" that were non-existent, and which never arrived in this country.

No claim is here made for a refund of duty on any merchandise received by the importers in a damaged condition. The portion of the cargoes actually received was not damaged. The importations were reduced in amount because of the destruction and total loss of a portion of the merchandise during the voyage. It is contended that a cargo reduced in amount is not a damaged cargo. Under no construction of the word "damage" can it be taken to mean a total destruction of value of a part of a quantity of goods, leaving the remainder intact. A mass of slush, even though containing a quantity of pineapple tops, and shown to consist largely of what had originally been pineapples, is not a lot of damaged pineapples. There was here no article actually existing but lessened in value, as is implied in the term "damaged." There were no pineapples in existence which were claimed to be damaged. To create an absolute loss of the goods entire annihilation was not essential. It was sufficient to bring it within a claim for loss or shortage, and not of damage, that the form and species and entire value of the pineapples were destroyed and lost. The duty imposed is not twenty per cent. of the value of the merchandise as stated on the invoice, but twenty per cent. of the actual value of the importation as received at the port of entry; and where any part of the cargo has ceased to exist, or where less than the entire amount stated on the invoice is found to be contained in the cargo, there is, to that extent, nothing on which duty can be assessed.

Counsel for the Collector on the argument in the courts below has contended that the claim of the importers is that the "unit of importation" is the individual pineapple, whereas the real unit was the invoice. If by this was meant that the unit was the amount of merchandise stated on the invoice, the duty being *ad*

valorem, the testimony as to the manner of assessing the duty contains the refutation of any such contention. But the claim of the importers is not that the unit of importation is the individual pineapple, but that, as stated heretofore, it is and should be the entire amount of the cargo: not necessarily the amount stated on the invoice, but the actual amount imported and discharged from the ship, and this is the only contention warranted by the manner of fixing the duty, or by the provisions of Section 10 of the Customs Administrative Act of 1890, which directs the ascertainment by the collector or appraisers of the actual value of the importation.

In importations of this character it is the practice of the Government in assessing the duty to count the number of pineapples contained in the cargo. And in the importations in suit the duty was assessed, not on the quantity in bulk as called for by the invoice, but on the number of pineapples estimated by the inspectors to be contained in the cargo, including those alleged to be contained in the slush. If the number so estimated by the inspectors had exceeded the number called for by the invoice, following the usual practice, duty would have been assessed in accordance with the inspector's estimate, without regard to the invoiced amount.

In the Matter of *Thomas B. Schall*, G. A. 656, decided by the Board of General Appraisers on June 6th, 1891, after the Act of June 10th, 1890, was in effect, this point was considered. In a cargo of oranges the number delivered fell short 35,700, and a quantity of "rots and slush" was brought up to the deck of the vessel and removed within twenty-four hours, in accordance with the health regulations of the City of Baltimore. The collector and naval officer reported that he was satisfied by proof that the oranges became rotten and worthless on the voyage, and never went into con-

sumption. It was held that it was proper for the Collector to make allowance therefor in the liquidation of duty upon the entry, citing Article 609 of the General Regulations (Article 922 of Customs Regulations of 1892), providing that an allowance should be made for lost or missing articles when it was satisfactorily proved to the collector and naval officer that they were lost or destroyed by accident during the voyage. The Board said:

> "Loss of fruit by decay may reasonably be held to be an accident, it being a loss by a contingency, chance or casualty."

II.

The importers should have been required to pay duty only on the quantity of pineapples actually imported by them within the intent and meaning of the Customs laws.

The claim here is made only upon that portion of the cargo which the importers never received, and which was not and would not be permitted to be landed. At the time of the arrival of the vessels in the Port of Baltimore, this portion of the cargo had ceased to be merchandise of any kind, and had become utterly worthless; the pineapples had lost all resemblance to their original form, and had no physical existence in species. It is not disputed that the number of pineapples on which duty was assessed was substantially the number originally contained in the exportations; but the Government does not base its right to collect

duties on the fact that merchandise has been shipped from a foreign port, destined for a port of the United States, whether such merchandise is ever received here or not. The right to assess duties rests solely on the fact that goods are brought into this country for consumption here. The actual quantity of merchandise imported determines the amount of duty, and not the original quantity bought and shipped from abroad. Or, as the rule is stated in *ss. 12,184:*

> "The Tariff Act prescribes rates of duty to be exacted on articles 'imported from foreign countries;' but no merchandise which does not arrive in a port of entry can be treated as imported."

As early as 1815 this Court stated this rule in *Arnold* v. *United States*, 13 U. S., at p. 120, where it was said:

> "To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States, and of a collection district, but also within the limits of some port of entry. This was expressly decided in the case of the *United States* v. *Vowell* (5 Cranch., 368)."

In the decision *T. D 21,525* it was said:

> "It is well settled in the construction of the Tariff Act that duties shall be imposed only on the quantity of merchandise actually imported and not necessarily upon that specified in the entry, even though the invoiced quantity exceeds the actual amount."

In the leading case of *Marriott* v. *Brune* (9 How., 619), decided by this Court in 1850, and followed in a long line of cases down to the present time, Mr. Justice WOODBURY, writing the opinion of the Court, said:

> "The general principle applicable to such a case

would seem to be that revenue should be collected only from the quantity or weight which arrives here. That is, what is imported—for nothing is imported till it comes within the limits of a port. * * * As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the Custom House; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the Act of Congress to be extended so as to embrace more. * * *

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing and never coming into the country would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor required to enforce just rights. It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. It is all he can re-export for drawback. * * *"

(9 How., pp. 632-633).

After referring to the express provisions in the tariff laws for loss through leakage and breakage in the case of liquors and other merchandise, the Court said:

"Yet there are other cases of loss, from various causes, which may be very uncertain in amount, for which no fixed and inflexible rate of allowance can be prescribed, and which must, therefore, in each instance, be left to be regulated by the general provisions for assessing duties, and the general principles applicable to them, as before explained. Consequently, where a portion of the

shipment in cases like these does not arrive here, and hence does not come under the possession and cognizance of the Custom House officers, it cannot, as heretofore shown, be taxed on any ground of law or of truth and propriety, and does not therefore require for its exemption any positive enactment by Congress.

"Such is the case of a portion being lost by perils of the sea, or by being thrown overboard to save the ship; or by fire, or piracy, or larceny, or barratry, or a sale and delivery on the voyage, *or by natural decay*. If there be a material loss, it can make no difference to the sufferer or the Government whether it happened by natural or artificial causes. *In either case, the article to that extent is not here to be assessed*, nor to be of any value to the owner.

"To add to such unfortunate losses the burden of a duty on them, imposed afterwards, would be an uncalled for aggravation, would be adding cruelty to misfortune, and would not be justified by any sound reason or any express provision of law. On the contrary, Congress in several instances, when the articles imported actually arrived here, and were afterwards destroyed by fire before the packages had been opened and entered into the consumption of the country, have refunded or remitted the duties * * *

"But much more should duties not be exacted on what was lost or destroyed on its way hither, and which never came even into the possession or control of the custom house officers, and much less into the use of the community."

(9 How., pp. 633-634).

This decision was followed in *United States* v. *Southmayd* (9 How., 637), where the same question was involved.

In *Lawrence* v. *Caswell* (13 How., 486) it was held that an *ad valorem* duty of 100% upon brandy should be charged only upon the quantity actually imported

and received by the importer, and not on the quantity stated in the invoice. Mr. Chief Justice TANEY, writing the opinion, said:

> "As relates to the first question (whether duty should be computed on the quantity stated in the invoice) it is substantially the same with that decided by the Court in the case of *Marriott* v. *Brune* (9 How., 619). The duty of one hundred per cent. *ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoice."

In the case of *Balfour* v. *Sullivan*, 17 Fed., 231 (decided in 1883), a cargo of coke, imported from Wales, owing to evaporation during the voyage, weighed several tons less when received here than when shipped. Following the decision in *Marriott* v. *Brune*, it was held that duty should be exacted only on the weight at the time of importation and not on the weight shown on the invoice. After quoting from *Marriott* v. *Brune*, in part as above, Mr. Justice SAWYER said:

> "The same rule was upheld in regard to brandy in *Lawrence* v. *Caswell*, 13 How., 488. So the weight of tea, as actually imported, was adopted as the proper basis for collecting duties in *U. S.* v. *Nash*, 4 Cliff., 107. * * * Duties are levied under the statute, and the decisions of the Supreme Court construing the statute, upon the amount of goods actually imported."

In *Weaver & Sterry* v. *Saltonstall*, 38 Fed., 493, the plaintiffs imported into Boston from Italy 1800 boxes of castile soap. After its arrival and entry at the custom house the soap was submitted to an examination by a weigher, who reported the weight to be 70,286 pounds, while the invoice made at the time of shipment from Italy showed the weight at the time of exportation to have been 92,983 pounds, on which duty was computed

and paid. The plaintiffs contended that duty should have been exacted only upon the value and amount of the importation as shown by the weigher's return. The action was brought to recover the difference in duty. Mr. Justice COLT, in the opinion of the Court, said:

> "It seems to me that the Courts have determined this question in favor of the importer. In principle I cannot distinguish this case from *Marriott* v. *Brune*, 9 How., 619; *U. S.* v. *Southmayd*, *id.*, 637; *Austin* v. *Peaslee*, 20 Law Rep., 443. * * * In *Marriott* v. *Brune* it was held that the true construction of the law is to assess duty only upon the quantity of sugar and molasses which arrives in port, and not upon the quantity which appears by the invoice to have been shipped. This doctrine was affirmed in *U. S.* v. *Southmayd* and in *Austin* v. *Peaslee*. The last paragraph of Section 2900, Rev. St., forbidding the assessment of duties upon an amount less than the invoice value, is substantially the same as the proviso contained in Section 8 of the Act of 1846 (9 St. at Large, 43). In *Marriott* v. *Brune* it is held that the decision is not inconsistent with the proviso in Section 8 of the Act of 1846, because the proviso refers only to the price, and not to the quantity. Such being the construction put upon the law by the supreme court and the circuit court for this circuit, the collector should have assessed duties only upon the quantity of soap which arrived in port, and not upon the quantity which appears by the invoice to have been shipped, and the plaintiff is entitled to a judgment for the excess of duties so exacted."

In *American Sugar Refining Co.* v. *United States*, 91 Fed., 646 (decided January 21st, 1899), it was shown that a cargo of moist or green sugar imported from Brazil had decreased in weight from drainage and evaporation at the time it reached the port of entry, thereby increasing the market value per pound. The General Appraisers decided that in determining the

market value of the sugar such increase in value should be considered, together with the decrease of weight, and duty assessed accordingly. In affirming the decision of the General Appraisers the United States Circuit Court for the Southern District of New York said:

> "Owing to drainage there are less pounds of sugar on arrival here than when the ship left Brazil, but the cargo is actually worth as much as when it started. It appears, therefore, that if the sugar had been kept for the same length of time in Brazil the same loss in weight by drainage and increase in value per pound would have taken place there, and the value of the cargo as a whole would not have been affected thereby. If this be so, I do not think the importers should gain by the decrease in weight coupled with an increase in value per pound. * * * This construction is supported by the statement of Mr. Justice Curtis in *Austin* v. *Peaslee* (2 Fed. Cas., 235), that 'the merchant is to pay duties on what is actually imported, not what is put up for export in the foreign country'; and of Judge Colt in *Weaver* v. *Saltonstall*, 38 Fed., 493, that the true construction of the law is to assess duty only upon the quantity which arrives in port, and not upon the quantity which appears by the invoice to have been shipped. * * *"

In a recent case before the United States General Appraisers (January 30, 1902), *T. D., 23,503, G. A. 5072*, involving an importation of The Franklin Sugar Refining Company, it was said:

> "It is not disputed, however, that a cargo of 9,536,438 pounds was shipped from Germany, and that it was the product of that country; nor is it disputed that the cargo—that is to say, the merchandise here in question—arrived within the customs district of Philadelphia. True, it did not arrive in the condition in which it was loaded on board the vessel, and if it were here only a question of regular duties there could be no question that

> duty would have to be assessed on the merchandise *in the condition in which it was imported and on the weight as imported.* So far as the regular duties are concerned, this, in fact, is what was done, and properly. The long line of authorities following the well-known cases of *Marriott* v. *Brune* (9 How., 619) and *Austin* v. *Peaslee* (2 Fed. Cas., 235) have settled this point beyond cavil."

A case in every way similar to the present case was that of *Shaw* v. *Dix* (72 Fed., 166), decided by the United States Circuit Court for the District of Maryland in 1896.

In that case the importers brought into the port of Baltimore two cargoes of cocoanuts in bulk, invoiced at specified prices per thousand. When the cargo was discharged the number of cocoanuts fell short of the number invoiced, and the shortage the Government officials estimated to be contained in a mass of broken and rotten cocoanuts, not countable, and of no value, which the importers were required to have taken out of the vessel and thrown away.

The collector assessed duty on the whole number of cocoanuts specified in the invoices, deciding that Section 23 of the Act of June 10th, 1890, was applicable, and that the shortage should be considered a damage to the merchandise, for which no allowance could be made, as it did not amount to ten per cent., and relying on the decision in *United States* v. *Bache*, 59 Fed., 762.

The Board of General Appraisers reversed the decision of the collector, and on an appeal to the United States Circuit Court the decision of the Board of General Appraisers was sustained. Judge MORRIS said, in the opinion of the Court:

> "It is quite true that the allowance for damage to imported goods is expressly regulated by Section

23 of the Act of June 10th, 1890, but it is true now, as it was before that Act was passed, that duty is not to be assessed on an article which does not arrive in this country (*Marriott* v. *Brune*, 9 How., 619). As to perishable fruits imported in boxes, cases or bags, and of which some in each package decay during the voyage, it may be held that the loss cannot be ascertained except by an estimate of the loss of value to each package by the decay of some of its contents, and as the invoice would call for so many packages, it might fairly be said that all the packages were imported, but in a damaged condition and of an impaired value. In such a case, no doubt, Section 23 would apply. But if any packages were broken up and the contents reduced to a worthless mass, it could not be fairly said that those packages arrived at all, or that duty could be exacted in respect to them. With respect to cocanuts imported in bulk, it would appear that those which rotted and were broken up on the voyage and became mere worthless debris in the hold of the ship, are a total loss. They are not a damage to the value of what remains, but they lessen the number which the importer receives. If this worthless material could be separated from the cargo while at sea and thrown overboard, the importer would be better off, because he would be saved the expense of having the stuff hauled away to the dump after the cargo is discharged."

In distinguishing that case from United States *v.* Bache, which is relied upon by the Collector here, Judge MORRIS says:

"*In U. S.* v. *Bache*, 59 Fed. Rep., 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed, but were damaged. It was clearly a case within the language of Section 23, and no question would have arisen but for the

fact that 'broken glass fit only to be remanufactured' was by law exempt from duty and admitted free. The importer claimed that as during the voyage a portion of each case became broken glass, its character as merchandise was changed and it became an article specifically exempted from duty and entitled to come in free, and that it made no difference that the dutiable and non-dutiable goods happened to come into this country in the same box. He claimed that he was chargeable with duty on the merchandise as it came into this country, and not as it was when it was put aboard the ship in the foreign port. It was held by the Circuit Court of Appeals for the Second Circuit that Congress having enacted a general statutory system for the ascertainment of the damage to imported goods and for allowance in respect to such damage, it could not be supposed that damages to importations of glass were to be exempted out of that general system simply because importations of broken glass had been put on the free list, and held that there was nothing indicating an intention by Congress to take the one article of glass out of the general system."

Shaw v. *Dix* (72 Fed. 166)

The Bache case differs too essentially from the present case to be controlling, for there the goods on which a refund of duty was claimed were actually imported and received by the importer, who, because of the change in the condition of the goods, contended that they were entitled to entry free of duty. There was no question that less than the amount of merchandise on which duty was assessed actually arrived, but the controversy was in regard to the proper classification of part of the importation.

III.

The fact that probable loss during the voyage may have been an element in fixing the price of the merchandise at the port of exportation can have no weight in determining the amount of duty.

In his brief, submitted upon the application for writ of certiorari and in the Court below, counsel for the Collector argued that the importers were claiming a double allowance for the pineapples that were destroyed, by reason of the practice which he asserted existed of taking into consideration the liability of the fruit to deteriorate in transit, in fixing its price at the port of exportation. It is difficult to see how this could be considered a "double allowance." The importers are ready and willing to pay duty on the actual value of the pineapples received, and ask to be relieved only from the payment of duty on those they did not receive, which is in no respect in the nature of compensation for the lost fruit. Counsel has assumed, however, a point which nowhere appears in the case, and on which no testimony whatever was offered. It is quite as fair to assume from the record that the imposition of duty on the worthless matter would cause a double hardship on the importers, in that they would be required not only to pay for merchandise not received, but also to pay duty on that merchandise. Under Section Ten of the Customs Administrative Act of 1890, it is the duty of the appraisers in fixing an *ad valorem* duty to ascertain the actual market value of the merchandise at the port of exportation, and it cannot be taken for granted that here they accepted a valuation which was too low, par-

ticularly in the absence of any evidence tending to show that any such practice was followed in this case.

But the same point was considered by this Court in *United States* v. *Southmayd* (9 How., 637), where it was said by Mr. Justice WOODBURY:

> "The additional point here arises on the evidence of several witnesses that, when sugars of this kind are purchased abroad, the buyer usually takes into consideration in fixing the price that the drainage or waste in weight will probably equal near five per cent. on the whole. It is argued that the price abroad is, therefore, lower in this proportion on this account; and hence, that no deduction should be made here for what is taken into consideration there.
>
> "But the first answer to this position is, that if the price is fixed too low there, or lower than it should be on the quantity likely to be saved and to arrive here, it is the duty of the appraisers to raise the price; and it must be presumed they would raise it, if required by all the facts. In the next place, this calculation by the merchant abroad in fixing the price is a mere speculative or commercial one, connected with profit and loss, and not with a view to the duties to be assessed here.
>
> "Again, the duty here is regulated by law, and not by any estimates of such a character by men of business, and by law it is imposed on the quantity entered here, and not the quantity shipped abroad; and on the true price abroad as estimated by the appraisers, and not necessarily as estimated by the owners. * * *
>
> "There are cases, likewise, of imports here, made by the producers of the article abroad. In those, this supposed element in the price to prevent the justice of a reduction in the weight here could hardly exist, as there is no sale abroad; and this shows the incongruity and want of applicability of such a fact to constitute a rule, in any case, for estimating *ad valorem* duties."

And in *American Sugar Refining Co.* v. *United States* (91 Fed., 646), cited above, the same rule was followed, allowance being made for the decrease in weight of the sugar, taken together with a consequent increase in value.

IV.

Section 23 of the Customs Administrative Act of June 10, 1890, which covers only cases of damage to the goods on which duty is imposed, and not cases of total loss of any part of the importation, is inapplicable here.

The intention of Congress in the section referred to plainly was to use the word damage according to its ordinary and accepted definition. The section provides that no allowance shall be made for damage to goods, etc., imported into the United States, but that the importer *may abandon to the Government all or any part of goods, wares and merchandise included in any invoice*, provided that the abandoned portion shall amount to ten per cent. or more of the whole invoice, to be sold or disposed of for the account and credit of the Government. There is no better ground for claiming that the provision includes a portion of the cargo totally destroyed, but still remaining in the vessel, than that it includes a portion which had been thrown or washed overboard during the voyage. The importer had not the option of taking or abandoning this portion of the cargo, as he should elect. He was obliged, under the sanitary regulations of the port, to remove it at once, without any question of abandonment.

Reading the entire section, the intent obviously was that the subject of an abandonment should be something that could be disposed of for the account of the Government, something of value, but which had, to a greater or less degree, been reduced in value. It could not have been contemplated that an article totally destroyed and having absolutely no value, but which would have to be disposed of without being landed, at an expense to the Government, should be abandoned to the Government as a source of revenue. The provision is for the abandonment of "goods, wares and merchandise"—terms which do not include a quantity of waste material.

In the case of *Shaw* v. *Dix*, *supra*, decided in 1896, it was said :

> "I think it is clear that the Board of General Appraisers was right in holding, in deciding the present case, that this section contemplated a case where there remains something to be abandoned, in the sense of being impaired in value, but that it is not applicable to a case where specific items of the invoice have been so entirely destroyed as that, in reckoning up to the items of the invoice, they cannot be counted, and where the destroyed items are valueless, and there remains nothing which can be the subject of abandonment. Section 23 of the Act of 1890 is not inconsistent with the general provisions of Section 2921 of the Revised Statutes, nor with Sections 906 and 922 of the General Regulations, providing that if the quantity which arrives is less than the invoice, there may be an allowance for the deficiency. In the present case it was not possible for the appraisers to say what number of cocoanuts was contained in the mass of debris remaining after the discharge of the cargo. It was estimated that this mass contained the difference between the number discharged and the number stated in the invoice. But the number specified in the invoice is not the result of an accurate count, the nuts being often brought on board in small

> boats, through the surf, so that it is not possible to say with any accuracy what number the mass of debris did represent. It is quite manifest that there is no ground for the contention that Section 23 is applicable to this case."

The true intent of the section is further shown by the provision which recently has been added to it, and included in the Customs Regulations of 1899, as follows:

> " All *merchandise* so abandoned by the importer thereof shall be delivered by such importer at such place *within the port of arrival* as the chief officer of customs may direct, and on the failure of the importer to comply with the directions of the collector in this respect the abandoned merchandise shall be disposed of by the collector at the expense of such importer."

The whole section, or any part of it, could not consistently be applied to any article which had lost all resemblance to "merchandise," and which the sanitary authorities would not permit to be landed at the port.

At the time this regulation was adopted, the law as laid down in *Marriott* v. *Brune* had been established for over forty years, and it was well understood that when a reduction in the amount of the cargo occurred during the voyage, it was to be considered as a case of loss, and not a damage to the cargo. If it had been the intention of Congress that this section should abrogate that rule, the language of the section could well have been, and it may be presumed, would have been made broad enough to cover cases coming within the rule, that is, such cases as were invariably held to be a loss, or shortage, and not a damage to cargo. No such language, however, was used, and the wording of the section being plain and unambiguous it must be regarded as covering all that Congress intended it should

cover, and be limited to cases of damage [illegible] in the actual meaning of the words used. As [illegible]d in the case of *Rice* v. *United States*, 53 Fed., at pp. 911 *et seq.*:

> "Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the Court must give them effect. It cannot substitute for the clear expressions which Congress has actually used, other expressions, which the Court think Congress ought to have used. * * *
>
> "The rule for the construction of statutes levying taxes or duties on the citizen is laid down by Lord CAIRNS in delivering the judgment of the House of Lords (Partington *v.* Attorney-General, L. R., 4 H. L., 100, 122), in this language:
>
> 'As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an "equitable construction," certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'
>
> Judge STORY says:
>
> "It is a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specially pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what

the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws, or laws founded upon any permanent public policy, and therefore are not to be liberally construed. *U. S.* v. *Wigglesworth*, 2 Story, 369.

"And this is the uniform doctrine of the authorities." (Citing *Net & Twine Co.* v. *Worthington*, 141 U. S., 474, and other cases.)

There is nothing in Section 23 inconsistent with or in contravention of the law as well established at the time of its adoption, and it cannot be presumed, in the absence of any expressed intent, that Congress intended to abrogate that rule.

V.

The decision of the United States Circuit Court of Appeals should be reversed and the cause remanded, with instructions to enter a judgment in favor of the Importers and against the Collector, William F. Stone, for the amount of excess of duties.

All of which is respectfully submitted.

Dated September 22, 1902.

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No. 632 298.

Bf. of Atty. Genl. (Richards) for Respt.

Filed April 23, 1901.

Office Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

October Term, 1900.

Miltenberger Lawder, Percy M. Lawder, and W. Ward Lawder, copartners, trading as S. M. Lawder & Sons, petitioners,
v.
William F. Stone, collector of customs for the district of Baltimore, Md.

No. 632.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

MILTENBERGER LAWDER, PERCY M. Lawder, and W. Ward Lawder, copartners, trading as S. M. Lawder & Sons, petitioners,
v.
WILLIAM F. STONE, COLLECTOR OF customs for the district of Baltimore, Md.

No. 652.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The petitioners for the writ are engaged in the business of importing pineapples. In the spring or early summer of 1897, they imported a number of cargoes of that fruit. At that time the tariff act of 1894 was in force. Paragraph 213½ of that act read as follows:

> 213½. Dates and pineapples, twenty-five per centum ad valorem.

When the vessels came to discharge, a number of pineapples out of each importation, and out of each invoice, were found to have so decayed as to have largely or altogether lost the shape of pineapples, and to have gone into what the witnesses in the case call

"slush." They had ceased to have any commercial value. In the case in controversy, the number of pineapples which had so decayed was less than 10 per cent of the whole amount of any invoice, and the importer could not abandon to the Government under the provisions of section 23 of the customs administrative act of June 10, 1890. The collector assessed duty on the entire amount of pineapples, the physical constituents of which were actually brought into the port, no matter in what condition they arrived. The importers protested, claiming they ought not to pay duty on such pineapples as had gone into "slush" before the cargo was landed. The Board of General Appraisers reversed the action of the collector and held that the importers were not liable to duty on such decayed and worthless pineapples. They stated, however, that they decided as they did because, and only because, they considered they were controlled by the opinion of District Judge Morris in the case of *Shaw* v. *Dix* (72 Fed. Rep., 166).

The collector appealed from the decision of the board to the United States circuit court for the district of Maryland. After hearing, Judge Morris adhered to his ruling in *Shaw* v. *Dix* (*supra*). From the decree of the circuit court, an appeal was taken by the collector to the circuit court of appeals for the fourth circuit. The last-named court (Goff and Simonton, circuit judges) reversed the decision of Judge Morris, and of the Board of General Appraisers, and held that the importers were not entitled to the allowance claimed by them.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

1. THE IMPORTERS ARE CLAIMING A DAMAGE ALLOWANCE.

Congress has said that no allowance shall be made for damage. Ever since the passage of the first tariff act claims for allowance or abatement for alleged injury or deterioration in value of imported goods on the voyage of importation have given rise to many difficult questions and controversies between the importers on the one side and the customs officials on the other. Unscrupulous importers contrived, by their skill and success in demanding and obtaining an abatement of duties because of alleged damage to their goods in transit, to secure a dangerous and demoralizing advantage over honest merchants. Secretary of the Treasury after Secretary of the Treasury called the attention of Congress to the evils growing out of the claims for damage allowance. For many years no real remedy for the evil was discovered. Finally, in the customs administrative act of 1890, a simple, just, and effective means of disposing of all such questions in what is practically an automatic way was devised. No longer was there to be any dispute between the Government and the importer. He, for himself and by himself, determined what goods were damaged. The custom-house officials had nothing to do with his determination. The Government had no means of controlling it. The text of the statutory provision then made is as follows:

> SEC. 23. That no allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon.

> But the importer thereof may, within ten days after entry, abandon to the United States *all or any portion* of the goods, wares, and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned:
>
> *Provided*, That the portion so abandoned shall amount to ten per centum or over of the *whole value* or *quantity of the invoice*.
>
> And the property so abandoned shall be sold by public auction, or otherwise disposed of, for the account and credit of the United States under such regulations as the Secretary of the Treasury may prescribe.
>
> (Section 23, chapter 407, of the acts of 1890, approved June 10, 1890, Supplement to the Revised Statutes, p. 754.)

All claims for allowance on account of damage were thus expressly abolished, but if an importer for any reason chose to say that some portion of his goods were or had become either absolutely worthless or were of so little value as not to make it worth his while to pay duty upon them, he had the right to abandon that portion of his importation to the Government, provided the portion he offered to abandon amounted to at least 10 per cent in quantity or value of the total invoice.

There can be no question but that the claim of the importers in this case is really a claim for a damage allowance. By the express declaration of the statute no allowance for damage shall be made. To say that the cargo of pineapples suffered more or less serious damage from decay is to describe in apt and accurate

language what happened to it. If this be true, it is respectfully submitted that the importers have no case, for the word "damage" is employed in the statute in the ordinary sense it has in daily conversation, and it has no special or technical meaning given to it. It is used in the broad sense, and is intended to cover all possible claims arising from injurious changes in the condition of the importation from the time it leaves the country of shipment to its final landing at the port of discharge.

A fortiori, the statute covers claims for that character of damage which is to a greater or less extent the natural and almost inevitable incident of the importation.

2. THE IMPORTERS ARE CLAIMING A DOUBLE ALLOWANCE FOR DAMAGE.

The importers are seeking what is practically a double allowance for damage. Every man, when he arranges to import pineapples into this country from the West Indies or the Spanish Main, knows that a greater or less number of them will decay before they reach the United States. In determining the price which he will pay for them at the place of shipment he always takes into consideration their liability to deterioration in transit. The duty is an ad valorem one and the value upon which it is assessed is the actual market value or the wholesale price of the merchandise in question at the time of exportation to the United States in the principal markets of the country from which the same has been imported. (Customs administrative act of 1890, sec. 7.)

The price of pineapples is lower in the markets of the country of export by reason of their inherent tendency to decay on the voyage. When the assessment of duties is made upon the actual value of the pineapples in the country of export, the importer has already an allowance for the average or normal decay of the fruit in transit. To permit him to deduct the decayed pineapples from the number of those upon which he pays duty is in effect to allow him double credit for the injured or decayed fruit. If pineapples will be worth at Baltimore $2 per hundred and it costs 50 cents a hundred to bring them from the Bahamas to Baltimore, and experience has shown that on an ordinary voyage about 5 in every 105 of the pineapples decay so badly as to become worthless, the market value in the Bahamas will be about $1.50 for about every 105 pineapples. The case thus presented can not be distinguished from that of *American Sugar Refining Co.* v. *The United States* (91 Fed. Rep., 646). The importation in that case was of moist or green sugar. It was subject to a duty of 40 per cent ad valorem. It was found that the crude sugars lost from 14 to 16 per cent in weight on the voyage from evaporation and drainage. The appraisers raised the appraisement of sugar from 6s. 8d. cwt., the value at the port of shipment, to 7s. 9d., an increase of about 16 per cent. The validity of this increase of appraisement was upheld by the circuit court of the United States for the southern district of New York.

Undoubtedly accidents may happen sometimes and the importer may lose out of some shipments more

pineapples than the average or normal percentage. In that case, however, he is protected, for whenever the loss amounts to more than 10 per cent in quantity or value of the total invoice he may abandon the damaged portion to the Government.

3. THE LEGISLATIVE CONSTRUCTION SHOWS THAT "DAMAGE" IN THE STATUTE INCLUDES DESTRUCTION OF COMMERCIAL VALUE.

The case for the importer rests upon the assumption that Congress intended by the language it used to include within the terms of the statute only such degree of damage as stopped short of the total destruction of commercial value. There is no warrant in the statute itself for this distinction. The whole scheme of the provision shows that the amount of damage intended must in all cases be at least great enough to render the goods abandoned worth less than the duty upon them: that is to say, they must have ceased to be of commercial value to the importer. If they were of any value to him he would not abandon them. Under the act, the abandonments of utterly worthless property became so numerous that Congress was compelled to require the importers to remove the abandoned goods to such place within the limits of the port of arrival as the chief officers of customs might direct. If the importer refuses or neglects to make such removal, the customs officers are authorized to cause the removal to be made at the cost of the importer. (The act of May 17, 1898, 30 St. L., 417.)

The terms of this act show that Congress considers articles which have ceased to have any commercial

value, and which are mere rubbish, as a part of the importation, and such a part as the importer is entitled to reckon as a portion of the whole 10 per cent necessary to give him the right of abandonment.

4. UNIFORM PRACTICE CONSTRUES "DAMAGE" TO INCLUDE DESTRUCTION OF COMMERCIAL VALUE.

The importers' claim is that the pineapples which have gone into "slush" have not been imported into the United States, and are not therefore subject to duty. If that be true, they can not for any purpose be a part of the importation. The record shows, however, that whenever, by taking the number of specked pineapples and adding them to the number which have gone into "slush," 10 per cent or more of the invoice could be made up, then it is the practice for the importers to tender, and the Government to accept, the abandonment. In all such cases the importers and the custom-house officers agree that the "slush" is a part of the importation. It is only when "slush" and specked pineapples do not amount to 10 per cent that the importers turn around and claim that the "slush" is not any part of the importation at all.

5. THE COURTS CONSTRUE "DAMAGE" IN THE STATUTE TO INCLUDE DESTRUCTION OF COMMERCIAL VALUE.

Two circuit courts of appeal have passed upon the very question raised by the contention of the importers, and both of them have decided in favor of the Government. The first case was *The United States* v. *Bache* (59 Fed. Rep., 762), in which the circuit court of ap-

peals for the second circuit, composed of Judges Wallace, Lacombe, and Shipman, expressly decided that where window glass had been so broken on its voyage over as to cease to exist as window glass, it was still dutiable as window glass. They pointed out that the cases of *Mariott* v. *Brune* (9 How., 619), and those following it, now relied upon by the importers, are not conclusive with respect to the duties to be imposed upon damaged goods where the allowance for damage is specially regulated by statute. To the same effect was the decision of the circuit court of appeals for the fourth circuit in the case at bar. (*Stone* v. *Lawder*, 101 Fed. Rep., 710.)

6. THE INVOICE IS THE UNIT OF IMPORTATION.

The learned district judge, who decided *Shaw* v. *Dix* (72 Fed. Rep., 166), distinguished that case from the case of the *United States* v. *Bache* (*supra*) on the ground that the glass in the Bache case was packed in hampers and each hamper made a separate unit, while the cocoanuts in *Shaw* v. *Dix* were imported in bulk and each cocoanut was a unit of importation.

The statute makes the invoice, and not each separate article included in the invoice, the unit of importation. The importers say that if any pineapple has been so damaged in transit that it has ceased to be a pineapple when it arrives at the port of discharge that pineapple must be deducted from the invoice number of pineapples. They, therefore, claim that each separate pineapple is a distinct unit of importation. The statute for the express purpose, as it is submitted, by negativing all

such claims, declares that the abandonment can only be made of a quantity not less than 10 per cent of the "*whole value or quantity of the invoice.*" The statute thus makes the invoice the unit, and it is obvious that Congress was well advised in so doing. What Congress wanted to do was at once and for all to get rid of all disputes over damage allowances. If the question, whether the importer was or was not entitled to the damage allowance, was to depend in each particular case upon what constituted the unit of importation, and if what was the unit of importation depended upon the way in which the goods were packed for the voyage, controversies would be multiplied rather than diminished. When Congress passed the customs administrative act of 1890, the rule that in importations of fruit the unit was the invoice, and not the individual pineapple, cocoanut, orange, or lemon, was established law. (*Scattergood* v. *Tuttle*, 2 Fed. Rep., 28.) In that case the fruit was imported under a statute which provided that there should be no allowance for decay on the voyage, unless the loss should exceed 25 per cent of the quantity, and the allowance then made shall be only for the amount of loss in excess of 25 per cent of the whole quantity. The court asks where was the warrant for applying the words "quantity" or "whole quantity" to a particular package. If the term "whole quantity" did not refer to the whole quantity imported, why should it be applied to the quantity of a particular package rather than to a particular orange, lemon, etc., damaged? The arrangement into several pack-

ages was merely for convenience of carriage, and the number and size of the packages, which are subject to the will of the importer, should not have, and have not, any effect on the liability to duty. The statute itself distinctly says that for the purpose of a damage allowance the unit of importation is the invoice. If the statute was silent on the subject there could still be no doubt that in cases such as that now under consideration the unit of importation can not be each separate pineapple. The duty is an ad valorem one. If each pineapple is a unit of importation, it would have to be separately assessed, as there can be no question that individual pineapples in each importation differ from each other in value, according to size, quality, etc. Of course, nothing of the sort is, or in the nature of things can be, attempted. What is done is to ascertain the value of such a lot of pineapples as make up the invoice in the principal markets of the country of export at the time of their export. The contention that each individual pineapple forms a unit of importation for the purpose under consideration is contrary to the language of the statute and is inconsistent with the known and necessary conditions of the trade.

CONCLUSION.

Congress intended to put an end to all claims for damage allowance unless such claims took the form of an abandonment of 10 per cent or more of the "total value or quantity of the invoice." This legislation was found within the constitutional powers of Congress.

The legislative intent is manifest. The courts will not reverse the will of Congress, nor by subtile refinements whittle away the beneficent effect of the statute and create a new class of cases for contention and dispute when Congress had determined to make all such disputes impossible. By giving to the statute its simple and natural meaning its purpose will be made effective. The provisions for abandonment will prevent any substantial injustice being done. In the class of cases now before the court the importer suffers no hardship at all, because the decay which takes place is normal and he has protected himself from loss by paying for the goods a lower price than he would have done had they not been liable to such decay.

The circuit courts of appeals for two circuits, in which the question has been raised, have decided adversely to the claims of the importers. Each of these decisions was by a unanimous court.

The petition for the writ of certiorari ought therefore, it is respectfully submitted, be denied.

JOHN K. RICHARDS,
Solicitor-General.

JOHN C. ROSE,
United States Attorney.

APRIL 22, 1901.

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No. 82.

Office Supreme Court U. S.
FILED
NOV 11 1902
JAMES H. McKENNEY
Clerk

Br. of Attorney Gen. (Hoyt) for Respondent.

Filed Nov. 11, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

MILTENBERGER LAWDER, PERCY M. LAWDER, and W. Ward Lawder, copartners, trading as S. M. Lawder & Sons, petitioners,
v.
WILLIAM F. STONE, COLLECTOR OF CUSTOMS for the district of Baltimore, Md.

No. 82.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

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No. 82.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

It is well settled that the United States is the proper respondent, and the title of the case should so read. (*Anglo-Californian Bank* v. *United States*, 175 U. S., 37, and cas. cit.)

Petitioners made several importations of pineapples during the year 1897, dutiable under paragraph 213½ of the tariff act of 1894 at 20% *ad valorem*. In each of these shipments a portion of the cargo was decayed and practically worthless, but the number of pineapples thus injured was not sufficient, except in one

instance, to permit their abandonment by the importers under section 23 of the act of June 10, 1890 (26 Stat., 140), which reads as follows:

> That no allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon: but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares, and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned: *Provided*, That the portion so abandoned shall amount to *ten per centum or over* of the total value or quantity of the invoice; and the property so abandoned shall be sold by public auction or otherwise disposed of for the account and credit of the United States under such regulations as the Secretary of the Treasury may prescribe.

The good pineapples were counted and delivered to the importers, and the remainder, composed in part of pineapples which were badly damaged, but still distinguishable as pineapples, and a mass of decaying tops and slush, were placed in baskets and an estimate made as to the number of good pineapples which went to make up the contents of each basket. This rejected mass was then disposed of as garbage. The customs officials collected duties on the whole number of pineapples imported, as shown by count and estimate, including the damaged and practically worthless pineapples (Rec., pp. 17–24). Protests were made in each

instance against the payment of duties on the damaged portions of each cargo, and after decisions adverse to the Government before the Board of General Appraisers (p. 12) and in the circuit court (p. 24), and adverse to the importers in the circuit court of appeals (p. 28), the case was brought here on writ of certiorari.

For some reason the real facts in this case, as shown by the record, in regard to the actual condition of the pineapples which were rejected appears to have been overlooked by the tribunals below. As matter of fact it was not a mass of unrecognizable matter, as described by petitioners in their protests and application for the writ, but consisted in large measure—variously estimated at from one-quarter to three-quarters of the portion rejected—of pineapples which could be identified and recognized as such. (Uncontradicted testimony of Cameron and Wilson, pp. 18, 21.) The rejected stuff was simply damaged pineapples which actually entered a port of the United States.

ARGUMENT.

I.

GENERAL CONSIDERATION OF THE LAW.

The provisions of section 23 clearly indicate that the United States is not concerned about the arrival of goods in a valuable condition. Of course the United States in no sense guarantees such condition. Thus the statute does not concern itself with the question whether the goods have full value, are damaged, or have no value. The object of this provision of the statute is to do away at once and completely with the

matter of damage allowance, notoriously open to abuse. This rule is absolute and marks a fixed policy of the Government. Beyond all question the statute contemplates the very situation of a loss of commercial value, and does intend the importer to pay duty on a worthless portion of his cargo, provided it is of small amount, fixed at 10 per cent of his importation.

The case of *Marriott* v. *Brune* (9 How., 619) is cited to sustain the position that duties can be recovered only on such goods as come into competition with the domestic production and are consumed by the public. The court there said:

> As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom house: that is all which goes into the consumption of the country: that, and that alone, is what comes into competition with our domestic manufactures: and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more. * * *
>
> It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. * * *

That case arose in regard to an importation of sugar and molasses, where by reason of drainage and waste there was a loss of weight, and it was properly held that duties were collectible only on the landed weight. In the *American Sugar Refining Co.* v. *United States*

(181 U. S., 610), the principle was further developed and the loss of weight countervailed by relative increase in value. The goods which arrived were taxed on the increased value of the reduced weight, without allowing any of the claim for loss or damage.

So far as such cases have any bearing when there is no question of drainage (peculiar to sugar, ores, soaps, and some other commodities) but simply a rejection of worthless stuff which physically arrives, they reinforce the rule of the present statute, which permits no escape. Goods are frequently brought into this country in such a damaged condition that they *can not* be consumed by the public, or enter into competition with domestic production, and yet the importer is required to pay duties thereon, as the damaged portion is not sufficient to permit of abandonment.

An effort was made to evade the operation of this statute in the matter of Thomas B. Schall (G. A., 656), decided by the Board of General Appraisers June 6, ~~1900~~ 1901, where the board held that—

> Loss of fruit by decay may reasonably be held to be an accident, it being a loss by a contingency, chance, or casualty.

This decision was not based on any act of Congress and is plainly incorrect. It relied on a regulation of the Treasury Department, formerly article 609 of the General Regulations of 1884, which provided that—

> No allowance will be made in the estimation of duties for lost or missing articles or packages appearing on the invoice unless shown by proof satisfactory to the collector and naval officer not

> to have been originally laden on board or to have been destroyed by accident during the voyage.

This regulation is within the law as providing for an allowance where the goods or articles are actually physically lost or destroyed during the voyage, and do not reach this country. The Government does not contend that duty shall be paid on goods that in truth do not arrive in a port of this country, but it does not and will not concern itself about the condition of such goods as do arrive. In G. A. 656 the fruit was not lost or missing or destroyed by accident. The decision was merely a mistaken effort to relieve a supposed hardship. Shipments of fruit are made, of course, in contemplation of the law and of the certainty of partial decay. The present regulation, which provides that no relief can be granted for deterioration or damage resulting from natural or avoidable causes, a situation which exactly fits the Lawder case, is as follows:

> *The law provides for relief from duties*, by order of the Secretary of the Treasury, *only in case of the destruction*, in whole or in part, *by actual fire or other casualty*, of bonded goods while in warehouse, or in transit from one port to another, or of goods in the appraiser's store undergoing appraisal, or in the custody of officers of customs, but not under bond, or after arrival in a port of entry and before being landed, *but not for deterioration or damage from natural or avoidable causes*. (Article 1236, Customs Regulations of 1899.)

The present case is also another attempt to circum-

vent the operation of the statute. Can there be any doubt as to the real meaning of section 23? Taken in its ordinary significance, the words "no allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made" mean, when applied to green fruit, that no allowance will be made for the ordinary deterioration of such fruit on the voyage to this country. Can there be any doubt that this and no more was exactly what happened to these importations of pineapples? Or can there be any doubt that this is one of the situations to which the statute is intended to apply?

Least of all should an importer of green fruits complain. It has been the uniform policy of the Government to place them on a different footing from other importers. For twenty years next preceding the passage of the act of 1890 importers of green fruit were obliged to stand all loss not amounting to 25 per cent of their cargoes; yet petitioners ask, Can it be possible that Congress intended them to pay duty on goods which they never actually received and which are utterly worthless? The answer is that undoubtedly Congress did intend that very thing. The policy of the Government for twenty years preceding the passage of the act now under consideration continues to be its policy, though in an altered form and robbed of its former severity. The act of July 14, 1870 (16 Stat., 265) provides that duties shall be levied as follows:

> On oranges, lemons, pineapples, and grapes, twenty per cent *ad valorem;* and on limes, bananas, plantains, shaddocks, and cocoanuts,

> ten per centum *ad valorem: Provided*, That *no allowance shall be made for loss by decay on the voyage, unless the same loss shall exceed twenty-five per centum* of the quantity, and the allowance then made shall be only for the amount of loss in excess of twenty-five percentum of the whole quantity.

As there are no words qualifying the extent of the decay, it is evident that the words, "loss from decay" include total destruction of the goods. This provision without substantial change was carried into the Revised Statutes as section 2504, Schedule M (p. 476), and remained in force until the passage of the act of 1890.

The debates in Congress on the passage of this act of 1890 show that while the provision in question was thought to be a hardship with regard to importers generally, yet the feeling did not extend to importers of green fruit. Mr. Fitch, a member of the House from New York, objected to the passage of this section on the ground that it punished the importer for a fault that was not his own, and took away from him all remedy except by abandoning his goods to the United States. But that his sympathy did not extend to importers of green fruit is evident from the fact that he offered to amend by striking out this section and inserting the following provision, which was defeated by a narrow margin:

> On oranges, lemons, and other green fruits, *no allowance shall be made for loss by decay* on the voyage, *unless the loss shall exceed twenty-five per cent* of the quantity imported and landed. (Cong. Rec., vol. 21, p. 842.)

The importers endeavor, by such expressions as "*it can not fairly be said* that such goods arrive at all," etc. (Record, p. 14), to subvert the plain meaning of the statute. As matter of fact, the goods actually did arrive, though in a damaged and worthless condition. Where is the authority, then, to warrant the collector, with the goods actually before his eyes, but in this damaged and worthless condition, in holding that the goods did not arrive, in the face of a statute which expressly provides for this very condition of things by declaring that no allowance for damage shall be made? If there had ever been a prior statute or a practice under which it was permissible to consider such decayed part as not having arrived, there might be some ground for the contention that Congress did not intend to interrupt that settled practice; but both the law and the practice were directly contrary to any such idea. Such fiction of law as the "failure to arrive" may be at times permissible, but it should never be recognized or allowed to operate when its object is plainly to subvert the direct provisions and clear intent of a statute.

II.

DUTIES WERE COLLECTED ONLY ON THE PINEAPPLES WHICH ACTUALLY ENTERED THE UNITED STATES.

The impression conveyed by the importers' argument is that the collector not only assessed duties on the good pineapples which were delivered, but also upon the number supposed to be contained in the mass of decaying vegetable matter, bilge water, and débris, being the difference between the number in the invoice

and the number actually delivered to the importers. What actually took place was that the collector assessed duties on the good pineapples which were delivered, and also upon the damaged and worthless pineapples which it was ascertained *by careful measurement and estimate* to have actually entered a port of this country, though in the form of slush. The discrepancy between the number shown in the invoice and the number definitely ascertained by direct count and estimate *was termed a shortage on which no duty was collected.* Thus duties were not collected on what it was assumed must have arrived, but only on what it was ascertained actually did arrive.

So far as the bilge water is concerned, the stuff was shoveled and forked into baskets in making the estimate (record, p. 19), and this does not seem a feasible way to treat liquid.

III.

AN IMPORTATION IS COMPLETE AND DUTY ATTACHES THE MOMENT THE GOODS ENTER A PORT OF THIS COUNTRY.

Goods are dutiable, not because or when the importer receives them, but the moment they arrive in port. The importers in their petition repeatedly state that they make no protest against the payment of duties on such goods as they actually received, when as matter of law they are liable for duties not only on such goods as they actually receive, but also on the whole importation that entered a port of the United States, whether they ever received any portion of the goods or not. The debt accrues the moment the goods arrive within the limits of some port

of entry. (*United States* v. *Vowell*, 5 Cr., 368; *Arnold* v. *United States*, 9 Cr., 104; *Meredith* v. *United States*, 13 Pet., 486.)

IV.

THE WORD "DAMAGE," AS USED IN THE STATUTE UNDER CONSIDERATION, CONTEMPLATES NOT ONLY THE ORDINARY DETERIORATION INCIDENT TO IMPORTATION, BUT ALSO INCLUDES TOTAL DESTRUCTION, IN MANY INSTANCES, SO FAR AS VALUE IS CONCERNED.

The statute provides that "no allowances for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon," etc. This provision marks a new departure in the policy of the Government with regard to the collection of duties. Theretofore the United States had made allowance in the estimation of duties for goods which had deteriorated or become damaged on the voyage to this country; but *this allowance*, it should be remembered, *was not made on importations of green fruit*, except where the "loss by decay," as it is referred to in the statute (act of July 14, 1870, 16 Stat., 265), amounted to 25 per cent of the cargo. This provision does not use the word "damage," as does the act of 1890 (although plainly the two expressions were intended to convey the same meaning), but "*loss by decay;*" and as the expression does not limit the extent of the loss, it fairly includes a total loss.

As before stated, the United States had been accustomed, prior to the act of 1890, to make allowance for damage on ordinary importations, but not on green fruit, unless the damage was very great. It was found,

however, to be a very difficult matter to determine in all cases just what allowances should be made, and disputes over damage allowances and evasions of the statute continually arose. It was finally determined to change the system entirely in regard to these allowances and throw the burden of their ascertainment on the importer. The United States accordingly declared, as shown in the present statute, that it would in future make no allowance whatever for damage to importations, but would allow the importer to abandon any portion of his merchandise within ten days after entry and be relieved from the payment of duty thereon, provided it amounted to 10 per cent or more of his importation. Thus the importer himself decides the extent of the damage, and whether or not the goods are so badly injured or decayed that he can not profitably pay duties thereon. As he can not abandon any portion of his goods less than 10 per cent of his importation, it follows that he is obliged to pay duties in some cases on goods that are impaired in value and in others that have practically no value whatever.

If the law needs any justification, it is to be found on the ground of proper and necessary expediency. In the case of *Scattergood* v. *Tuttle* (2 Fed. Rep., 28, 30), which arose under section 2504, Revised Statutes, the court says that that provision was made "manifestly to avoid allowances for trifling losses."

In the application of section 23 to the case now before the court the Government contends only for the ordinary, natural meaning of the words of the statute. Giving the word "damage" its ordinary significance,

it would include the usual deterioration and decay of green fruits, including the varying gradations of such decay, in some instances greater and in some less, but embracing in its operation all the visible constituent parts of the fruit. This necessarily involves, in perhaps every such shipment, the total destruction of a portion of the cargo, so far as value is concerned. The expression "damaged goods" is not confined to goods having a value. Goods may be so badly damaged as to have no commercial value whatever, and yet they are clearly damaged goods. It is only a question as to the extent of the damage, and the statute imposes no limit.

Prior legislation shows that these provisions are intended to cover, when applied to perishable fruits, all "loss by decay." The provision now under consideration is a general one and covers all kinds of importations—other merchandise as well as fruits. The term "loss by decay" could not be employed to include all classes of importations, and it is difficult to see what more suitable term than "damage" could have been employed. The whole trend of legislation on this subject shows that the terms "damage" and "loss by decay" should be used synonymously as applied to importations of green fruit.

V.

PROVISION RELATING TO THE DISPOSITION OF THE PORTION SO ABANDONED.

The provision referred to reads as follows:

> And the property so abandoned shall be sold by public auction or otherwise disposed of for the account and credit of the United States.

Petitioners contend that this provision obviously means that the goods abandoned must have some value. Sufficient has been said to show that the other portions of section 23, which deal directly with the question of allowing an abandonment of the goods, do not make any such requirement. It is therefore by inference alone that such a conclusion is arrived at.

What this clause clearly did intend was to make some provision for the disposition of all kinds of goods, wares, and merchandise that might be abandoned. It is very evident that, excepting green fruit, the goods abandoned would almost always have some value, but not sufficient to warrant the importer in paying duties thereon. As the United States is not required to pay this duty, it could in the majority of instances realize something from their sale. Therefore we find the provision directing that goods shall be sold "for the account and credit of the United States;" but that is not the only means of disposition authorized. The statute reads, "sold by public auction *or otherwise disposed of* for the account and credit of the United States." The words "or otherwise disposed of" evidently refer to another manner of disposition than by sale.

If the statute intended to include a private sale as well as sale by auction, more fitting words would undoubtedly have been chosen. The words "or otherwise disposed of" clearly mean another manner of disposition. All that is lacking from this sentence to make the matter perfectly clear is the insertion of two commas at their proper places. The provision would then read,

"sold by public auction, or otherwise disposed of, for the account and credit of the United States." This would make the clause stand by itself and have no necessary connection with the words "for the account and credit of the United States," as requiring value and pecuniary avails for the United States.

There is really nothing in the circumstance that abandoned goods are totally destroyed which in any way injuriously affects the importer more than if they still retained a value. *So long as he is obliged to abandon his goods, it is a matter of utter indifference to him whether they have a value or not.*

The granting of this importer's contention would work a great hardship on importers generally, for if they may only abandon such goods as have a value, then they must surely pay duties on all damaged goods entering this country which have no value, no matter how large a portion of their importations may be affected.

The case of *Shaw* v. *Dix* (72 F. R., 166) is seemingly the only case directly in favor of the plaintiff's contention, and on that account it is advisable to refer to it briefly, although the arguments based on it have been heretofore answered.

The case arose over two cargoes of cocoanuts imported in bulk at a specified price per thousand. On the discharge of the cargoes it was found that the number of cocoanuts delivered fell short of the number stated in the invoice, and the Government officers accounted for the shortage as being contained in a mass

of broken and decayed cocoanuts found on the vessel, which were not and could not be counted, and exacted duty thereon.

It will be observed that while that case is similar in many respects to the Lawder case, yet it differs in an essential respect, to wit: In the case of *Shaw* v. *Dix*, the Government collected duties on the cocoanuts which actually arrived and were delivered, and also on those which it was assumed must have arrived, making no allowance for shortage; while in the Lawder case duties were collected only on such goods as it was ascertained by careful estimate and count actually did arrive, but no duties were collected on the shortage. That case, therefore, may have been properly decided, although the Government does not concur in the reasoning of the court.

The proper line of distinction, and one which may be applied to every case of this character, is this, that duty accrues the moment imported goods, wares, and merchandise enter a port of this country, *and on every portion of the cargo that the collector can in any manner definitely ascertain to have arrived.* The collector is not confined to a count, measurement, or weight of the goods imported. Duty accrues under our law on both good and bad, on sound and damaged merchandise, no matter how badly damaged. The collector's sole duty is to ascertain if the goods actually arrived, and in the ascertainment of this fact he is not limited to any particular method. The ascertainment was reached in the Lawder case in a perfectly fair and reasonably accurate manner.

VI.

THE SITUATION OF THE IMPORTERS IS NOT ONE OF PECULIAR HARDSHIP.

In every importation of tropical fruits the importer is aware of the fact that a portion of the cargo will undoubtedly deteriorate and decay on the voyage. He purchases the goods with this in view, and the price at the place of shipment is regulated to meet this very condition. This fact is clearly illustrated on page 6 of the brief of the United States in opposition to the petition for writ of certiorari, which reads as follows:

> If pineapples will be worth at Baltimore $2 per hundred, and it costs 50 cents a hundred to bring them from the Bahamas to Baltimore, and experience has shown that on an ordinary voyage about 5 in every 105 of the pineapples decayed so badly as to become worthless, the market value in the Bahamas will be about $1.50 for every 105 pineapples.

All importations of tropical fruits which enter a port of this country at the same period, are subject to practically the same climatic conditions. If the weather is hot, the fruit deteriorates rapidly, and as there is no domestic production to compete with it, the prices of these commodities advance. Thus it is the public who, by paying a higher price for the importer's goods, really stands the brunt of the loss.

The situation of importers of merchandise not perishable is very different in this respect. The only way that their goods deteriorate is by chance or casualty. These importers may reasonably expect, subject to

unforeseen accident, and not because of natural deterioration, that their goods will arrive in good condition, and when such an importation is injured the importer's loss is a real one. He can not charge the loss up to the public, for he must compete with his more fortunate rival whose goods were not injured, and also with domestic manufacturers. It is for this reason that the earlier statutes pointedly discriminated against importers of green fruit—because from the nature of their importations they stand on a very different and more advantageous ground than any other class of importers. The present statute, however, makes no discrimination whatever against importers of green fruit, placing them on the same footing as other importers who have no way of recouping themselves against damage. Practically, the importers here desire the Government to insure their cargoes, and guarantee delivery in good or reasonably good condition of all ripe fruit upon which they are obliged to pay duties. Certainly this is a most extraordinary proposition, in the face of a statute which declares that no allowance whatever shall hereafter be made for damage to goods, wares, or merchandise imported into the United States.

Another peculiarity of the situation is this: Importers of fruit have all along been availing themselves of the privilege of abandoning damaged and worthless pineapples on the ground that they are damaged pineapples; and now, because an insufficient number were damaged to permit of their being abandoned, petitioners claim that they are not pineapples at all, but a mass of unrecognizable matter which can

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not properly be described as damaged pineapples. Does the fact that a fewer or a larger number of pineapples were damaged and decayed affect their character as pineapples or as a part of the cargo? If these worthless pineapples are "goods, wares, and merchandise" for the purpose of abandonment, they certainly do not change their character and entirely lose their existence merely because the deterioration happens to fall below the 10 per cent mark.

VII.

CONCLUSION.

The situation therefore resolves itself into a very simple proposition. If the character of the goods was such as is herein represented—and the Government submits the evidence of the record itself; if the goods in question actually arrived in port—and again the record is submitted with the petitioners' own statements; if it is true that duty accrues the moment goods enter a port of the United States, and not because or when the importer receives them—a proposition so elementary as not to admit of discussion; and if the importers were unable to abandon their goods (because of the trifling percentage of loss) or neglected to avail themselves of that privilege, there seems to be no escape from the conclusion that the duties were properly collected; and the judgment of the circuit court of appeals should therefore be affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

JAMES A. FINCH.

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Supreme Court of the United States.

No. 82.—October Term, 1902.

Miltenberger Lawder et al., Petitioners, vs. William F. Stone, Collector. } On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 1, 1902.]

In the months of May, June and July, 1897, the petitioners, copartners, trading as S. M. Lawder & Sons, imported into the port of Baltimore from the British West Indies several cargoes of pineapples, invoiced as a specified number of dozens.

Upon the discharge of the cargo at Baltimore, after the pineapples had been taken out of the vessels and their number estimated by the inspectors, there remained in the holds a quantity of what was described as "slush," consisting of decomposed vegetable matter, mixed with bilge water and other *debris* of the cargo, some of it in a semi-liquid condition. This slush was brought up from the holds in baskets and included by the inspectors in their appraisement of the cargoes. The pineapples alleged to be contained in the slush were uncountable, and their number was roughly estimated by the inspectors by counting the pineapple tops and butts contained in a number of baskets of the slush, striking an average of those baskets, and then calculating the number contained in the whole quantity of slush according to that average. The material thus removed from the vessels was commercially valueless, and under the sanitary regulations of the city of Baltimore was taken down the river on a scow and dumped overboard. The number of pineapples so estimated by the inspectors to be contained in the slush was less than ten per cent of the total invoice, and the collector treated the loss as a case of damage to the cargo within the meaning of section 23 of the customs administrative act of June 10, 1890, and assessed duty on the whole number of pineapples estimated by the inspectors to be contained in the cargoes, including this quantity of slush.

The board of general appraisers sustained a protest of the importers against the assessment of duties on the worthless and indistinguishable mass referred to, and this decision was affirmed, on appeal of the collector, by the Circuit Court of the United States for the District of Maryland. On a further appeal by the collector the Circuit Court of Appeals for the

Fourth Circuit reversed the decisions which had been made in favor of the importers and sustained the action of the collector. (101 Fed. Rep. 710.) The case was then brought to this court by writ of certiorari.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

As mentioned in the preceding statement, the collector of customs for the district of Baltimore treated the loss arising from the worthless condition of the portion of the cargo in question as a case of damage to the entire cargoes, within the meaning of section 23 of the customs administrative act of June 10, 1890. That section reads as follows:

"That no allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon; but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned: *Provided*, That the portion so abandoned shall amount to ten per centum or over of the total value or quantity of the invoice; and the property so abandoned shall be sold by public auction, or otherwise disposed of for the account and credit of the United States under such regulations as the Secretary of the Treasury may prescribe."

Do pineapples, which, on the voyage to this country, become so decayed as to be utterly worthless, constitute, upon arrival within the limits of a port of entry of the United States, goods, wares and merchandise imported into the United States, within the meaning of this expression as employed in the section above quoted? is the question for decision.

In *Marriott* v. *Brune*, (1850) 9 How. 619, it was held that, under the eleventh section of the tariff act of July 30, 1846, where a portion of a cargo of sugar and molasses was lost by leakage on the voyage to this country, duty should be exacted only upon the quantity of sugar and molasses which arrived here and not upon the quantity which appeared to have been shipped. In the course of the opinion the court said (p. 632):

"The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is imported—for nothing is imported till it comes within the limits of a port. See cases cited in *Harrison* v. *Vose*, (9 How. 372.) And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries; or the importation from them, or what is imported. (5 Stat. at Large, 548, 558.) The very act of 1846 under consideration imposes the duty on what is 'imported from foreign countries.' (p. 68.) The Constitution uses like language on this subject. (Article 1, secs. 8, 9.) Indeed, the general definition of customs confirms

this view; for says McCulloch (vol. 1, p. 548,) 'Customs are duties charged upon commodities on their being imported into or exported from a country.'

"As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures, and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

"When the duty was specific on this article, being a certain rate, per pound, before the act of 1846, it could of course extend to no larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad, whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor required to enforce just rights.

"It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. It is all he can re-export for drawback. (1 Stat. at Large, 680–689; 4 Stat. at Large, 29.)"

After instancing certain cases provided for in a statute where a fixed percentage was directed to be deducted for leakage and breakage and a reduction in weight for tare and draff, the court further said (p. 632):

"But beside these instances, in cases of an actual injury to an article arriving here in a damaged state, a reduction from the value is permitted expressly on account of the diminished value. (1 Stat at Large, 41, 166, 665.)

"The former cases referred to for illustration rest on their peculiar principles, and allowances in them are made by positive provisions in acts of Congress, even though the quantity and weight of the real article meant to be imported should arrive here. Because, knowing well that the whole is not likely to arrive, and being able to fix, by a general average, the ordinary loss in those cases with sufficient exactness, the matter has been legislated on expressly.

"Yet there are other cases of loss, from various causes, which may be very uncertain in amount, for which no fixed and inflexible rate of allowances can be prescribed, and which must, therefore, in each instance, be regulated by the general provisions for assessing duties, and the general principles applicable to them, as before explained. Consequently, where a portion of the shipment in cases like these does not arrive here, and hence does not come under the possession and cognizance of the custom-house officers, it cannot, as heretofore shown, be taxed on any ground of law or of truth and propriety, and does not therefore require for its exemption any positive enactment by Congress.

"Such is the case of a portion being lost by perils of the sea, or by being thrown overboard to save the ship; or by fire, or piracy or larceny, or barratry, or a sale and delivery on the voyage, or by natural decay. If there be a material loss, it can make no difference to the sufferer or the government whether it happened by natural or artificial causes. In either case, the article to that extent is not here to be assessed, nor to be of any value to the owner.

"To add to such unfortunate losses, the burden of a duty on them, imposed afterwards, would be an uncalled for aggravation, would be adding cruelty to misfortune, and would not be justified by any sound reason or any express provision of law. On the contrary, Congress, in several instances, when the articles imported actually arrived here, and were afterwards destroyed by fire before the packages had been opened and entered into the consumption of the country, have refunded or remitted the duties. (2 Stat. at Large, 201; 5 Ibid. 284; 6 Ibid. 2.)

"But much more should duties not be exacted on what was lost or destroyed on its way hither, and which never came even into the possession or control of the custom-house officers, and much less into the use of the community."

The doctrine of this decision clearly supports the proposition that it would be inequitable and presumably not within the intention of Congress to assess duty upon an article which on a voyage to this country and before arrival within the limits of a port of entry had become utterly worthless by reason of casualty, decay or other natural causes, and which the importer might rightfully abandon and refuse to receive or enter for consumption. In other words, that articles thus circumstanced were not in truth within the category of goods, wares and merchandise imported into the United States, within the meaning of the tariff laws. The ruling in *Marriott* v. *Brune* was approved and applied in *United States* v. *Southmayd*, (9 How. 637,) and *Lawrence* v. *Caswell*, and it has been consistently recognized by this court that as a general rule duties are intended to be levied only upon the value of goods which possess some intrinsic or other value at the time when ordinarily the duty would attach on an article.

That the policy we have stated was regarded by Congress as the true doctrine to be applied, is shown by the legislation with respect to the remission of duties upon goods, wares and merchandise in general, to the extent that the same were damaged. Thus, as stated in *United States* v. *Bache*, (59 Fed. Rep. 762, 763,) the statutory system, from 1799 to the adoption of the tariff act of October 6, 1890, in regard to rebates of duties on account of damage to imported merchandise in transit, was embodied in section 2927 of the Revised Statutes, being a substantial reproduction of a section of the act of 1799. The section of the Revised Statutes reads as follows:

"SEC. 2927. In respect to articles that have been damaged during the voyage, whether subject to a duty ad valorem, or chargeable with a specific duty either by number, weight or measure, the appraisers shall ascertain

and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage, so ascertained and certified, shall be deducted from the original amount subject to a duty ad valorem, or from the actual or original number, weight or measure, on which specific duties would have been computed. No allowance, however, for the damage on any merchandise that has been entered, and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may on examining the same prove to be damaged, shall be made, unless proof to ascertain such damage shall be lodged in the custom-house of the port where such merchandise has been landed within ten days after the landing of such merchandise."

So, also, by section 2921 of the Revised Statutes, it was provided as follows:

"SEC. 2921. If, on the opening of any package, a deficiency of any article shall be found, on examination by the appraisers, the same shall be certified to the collector on the invoice, and an allowance for the same be made in estimating the duties."

By the act of July 14, 1870, (16 Stat. 265,) however, an exception was engrafted upon the general provision as to allowances for damage which might have resulted to goods, wares and merchandise on the voyage, by the enactment that no allowance should be made with respect to certain fruits, for loss by decay on a voyage, unless the same should exceed twenty-five per centum of the whole quantity, and the allowance then made should be only for the amount of loss in excess of twenty-five per centum of the whole quantity. As said in *Scattergood* v. *Tutton*, (2 Fed. Rep. 28,) the limitation was applied "manifestly to avoid allowance for trifling losses." While, however, certain fruits were made dutiable by the tariff act of March 31, 1883, (22 Stat. 504,) and certain other fruits (including pineapples) were placed on the free list, (Ib. 519,) the discrimination referred to against damage allowances upon importations of fruit was not continued, and in section 23 of the customs administrative act of 1890 fruits are not discriminated against.

In its decisions upon applications of importers to be exempted from payment of duties because of the practical destruction of an article while in transit to this country, or for an allowance because of damage occasioned to imported goods before arrival here, the Treasury Department has frequently applied the doctrine enunciated by this court in *Marriott* v. *Brune*, viz., that the purpose of Congress in enacting tariff laws was to exact the payment of duty only upon imported articles which were in truth and in fact, entitled to the appellation of goods, wares and merchandise, articles which were not absolutely worthless but may possess some value for use or consumption. Thus, in Treasury Decision No. 424, of date July 15, 1869, duties were ordered to be remitted on four cases of needles which had become worthless by reason of being submerged in salt water on the voyage of importation. It was held that the case did not come within the pro-

hibition of the thirty-third paragraph of the third section of the act of July 14, 1862, which prescribed that no allowance for partial loss or decay should be made in consequence of rust of iron or steel, &c. Again, in Treasury Decision No. 1167, of date July 8, 1872, fruit which had become worthless on the voyage of importation was held not dutiable, and the provision of the act of July 14, 1870, limiting the damage allowance on fruit, was held not to apply, and it was ordered that the case should be treated as if no importation had been made. In the course of the decision, known as Treasury Decision No. 3236, of date May 14, 1877, after ruling that the "quantity" specified in the act of July 14, 1870, limiting allowances for damage to green fruit, referred to the quantity specified in the damage application and landed in the United States, it was observed (italics not in the original):

"In many instances a *portion* of a cargo of green fruit becomes wholly worthless by decay, and such portion is to be excluded in considering the quantity upon which damage is to be estimated, unless it is included in the damage warrant."

In Treasury Decision No. 3272, dated July 21, 1877, passing upon a case where an importer, in his application for damage allowance upon forty-one barrels of oranges, included as part of the forty-one barrels, twenty and a half barrels of entirely worthless oranges, it was declared that, if the goods had been landed in the United States as any other merchandise and no damage application had been filed, duty would have accrued thereon; whereas if they had been thrown overboard at sea, no duty would accrue, as there would have been no importation of that quantity. In Treasury Decision No. 4126, of date August 1, 1879, upon application being made for a damage allowance upon an invoice of certain oranges and lemons, the goods were reported damaged "to the extent of one hundred per cent, in other words, entirely worthless." The ruling in Treasury Decision No. 1167 was applied, and it was held that, where fruit was so damaged on the voyage of importation as to be entirely worthless, the clause in the statute limiting the damage allowance to the excess over twenty-five per cent did not apply, and that the case should be treated the same as if no importation had been made. Treasury Decision No. 9719, dated November 19, 1889, reads as follows:

"Sir: The Department is in receipt of your letter of the 13th instant, reporting further on the appeal (537*x*) of Messrs. Riley & Grey from your assessment of duty on certain card clothing, imported by them per 'Bulgarian' February 16, 1889, and found, upon examination, to have been destroyed by water during the voyage of importation.

"The appraiser reports that the clothing in question was wound in coils, and has been subjected to a complete soaking with salt water, which has permeated the entire coil, oxidizing the wire and completely rotting the cotton backing, so that it is absolutely worthless, and cannot be used for any purpose whatever, even as old junk.

"In view of this report, the Department is of opinion that the card clothing is not an importation of merchandise within the meaning of the law, and you are hereby authorized to readjust the entry and to refund the duty levied thereon."

After the passage of the customs administrative act of June 10, 1890, the board of general appraisers, on June 6, 1891, announced its decision upon a protest against the exaction of duty on an alleged shortage of 35,700 oranges, part of an invoice of 280,000 oranges, on which entry had been made and the duty paid. The shortage was not ascertained until after the payment of the duties, and such shortage was presumably represented by a quantity of "rots and slush," which had been removed from the vessel in obedience to the health ordinance of the city of Baltimore. The collector and naval officer reported that they were satisfied by proof that the 35,700 oranges became rotten and worthless on the voyage and never went into consumption. It was held that the collector was authorized to make allowance for the shortage in the liquidation of the duty on the entries. In the course of the decision it was said:

"As they could not be abandoned in the manner provided for the abandonment of merchandise in section 23 of the act aforesaid, the collector exacted duty upon the entire entry. Article 609 of the General Regulations permits an allowance for lost or missing articles when it is shown by proof satisfactory to the collector and naval officer that they have been lost or destroyed by accident during the voyage. Loss of fruit by decay may reasonably be held to be an accident, it being a loss by a contingency, chance or casualty. Section 23 aforesaid would not apply where there had been a total loss of dutiable articles, for the word 'damaged' is there used in the sense of impairment or injury, and the section contemplates that something remains to be abandoned."

Treasury Decision No. 16138, dated June 8, 1895, related to a claim of allowance for shortage on an importation of cocoanuts, the shortage being occasioned by the rotting and breaking of certain cocoanuts on the voyage of importation. In consequence of the ruling in *United States* v. *Bache*, (59 Fed. Rep. 762,) wherein it was held that glass broken on the voyage of importation, *but which possessed some value for remanufacture*, should be allowed for as a damage within the meaning of section 23 of the customs administrative act of 1890, the Treasury Department refused to accept the doctrine laid down by the board of general appraisers, viz., that merchandise the value of which is totally destroyed ceases to be damage and may properly be treated as a shortage. This last was but another form of stating the proposition that that which has been rendered worthless on the voyage to this country, by casualty, decay or other natural causes, is not embraced within the category of goods, wares and merchandise, even though existent on the vessel on its arrival within the limits of a port of entry. On the controversy, however, being brought into the courts, the decision

of the board of general appraisers was upheld. (*Shaw, Collector*, v. *Dix*, 72 Fed. Rep. 166.) In distinguishing the case before it from the Bache case the court said (p. 167:)

"In *United States* v. *Bache*, (8 C. C. A. 258, 59 Fed. Rep. 762,) the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed, but were damaged. It was clearly a case within the language of section 23, and no question would have arisen but for the fact that 'broken glass, fit only to be remanufactured,' was by law exempt from duty and admitted free. The importer claimed that as during the voyage a portion of each case became broken glass, its character as merchandise was changed, and it became an article specifically exempted from duty and entitled to come in free, and that it made no difference that the dutiable and non-dutiable goods happened to come into this country in the same box. He claimed that he was chargeable with duty on the merchandise as it came into this country, and not as it was when it was put aboard the ship in the foreign port. It was held by the Circuit Court of Appeals for the Second Circuit that, Congress having enacted a general statutory system for the ascertainment of the damage to imported goods, and for allowance in respect to such damage, it could not be supposed that damages to importations of glass were to be exempted out of that general system simply because importations of broken glass had been put on the free list, and held that there was nothing indicating an intention by Congress to take the one article of glass out of the general system. The general system provides that if the damage amounts to ten per cent of the total invoice, the importer may abandon any portion of the invoice and be relieved from the duties on the portion so abandoned.

"I think it is clear that the board of general appraisers was right in holding, in deciding the present case, that this section contemplated a case where there remains something to be abandoned, in the sense of being impaired in value, but that it is not applicable to a case where specific items of the invoice have been so entirely destroyed as that, in reckoning up to the items of the invoice, they cannot be counted, and where the destroyed items are valueless, and there remains nothing which can be the subject of abandonment. Section 23 of the act of 1890 is not inconsistent with the general provisions of section 2921 of the Revised Statutes, nor with sections 906 and 922 of the General Regulations, providing that, if the quantity which arrives is less than the invoice, there may be an allowance for the deficiency. In the present case it was not possible for the appraisers to say what number of cocoanuts was contained in the mass of debris remaining after the discharge of the cargo. It was estimated that this mass contained the difference between the number discharged and the number stated in the invoice. But the number specified in the invoice is not the result of an accurate count, the nuts being often brought on board in small boats through the surf, so that it is not possible to say with any accuracy what number the mass of debris did represent. It is quite manifest that there is no ground for the contention that section 23 is applicable to this case. The decision of the board of general appraisers is sustained."

Article 1236 of the customs regulations of 1899 was referred to in the argument at bar as supporting the contention on behalf of the government that Congress intended by section 23 of the customs administrative act of June 10, 1890, to classify everything reaching this country, invoiced from a foreign port, as imported goods, wares and merchandise, however worthless specific articles might have become during the voyage. But the regulation lends no support to this contention. It was based upon section 2984 of the Revised Statutes, which conferred authority upon the Secretary of the Treasury to remit impost duties paid or accruing upon imported merchandise which had been injured by accidental fire or other casualty after arriving in this country and while in the actual or constructive possession of the officers of the government. In effect, by the terms of the regulation, section 2984 of the Revised Statutes is construed as not conferring authority upon the Secretary of the Treasury to make allowances for any deterioration or damage to such merchandise from natural or avoidable causes, arising after the arrival of merchandise and the attaching of duties thereon, a ruling which throws no light upon the proper decision of the question we are considering.

When Congress enacted the customs administrative act of 1890 it must be presumed to have possessed knowledge of the decisions of this court to which we have referred and the consistent application made of the doctrine of those decisions by the officials charged with the execution of the tariff laws, as evidenced by the cited Treasury decisions. In the light of this fact, it would require a clear expression by Congress of its intention to adopt a contrary policy, before a court would be justified in holding that such was the purpose of the legislative branch of the government. Section 23 of the customs administrative act contains no such clear expression of an intention to alter the prior practice, but the contrary. The reference in section 23 to an allowance for "damage," and the provision that the abandoned portion of cargo should "be sold by public auction or otherwise disposed of for the account or credit of the United States," manifestly imports that it related to an article which when the duty attached was possessed of some value, and therefore negatives the idea that Congress was concerning itself with that which was destitute of all value. When, therefore, it was enacted that in a certain contingency no allowance should be made for "damage to goods, wares and merchandise imported into the United States," it is reasonable to construe this language as not referring to an article, case or package, which though in the semblance of merchandise, had become absolutely valueless by reason of natural causes or casualty occurring thereto while the article, case or package was in transit to the United States. The section then not embracing articles which upon arrival in this country were outside of the category of imported goods, wares and merchandise, such articles must be held, in accordance with the prior

rulings on the subject, not to be susceptible to assessment for duty. If, as is conceded by the government, the rotten and worthless pineapples in question had been thrown overboard before the vessel reached this country, and no duty could have been assessed upon the fruit thus disposed of, the circumstance that the mass of rotten fruit in question could not perhaps have been gotten at upon the voyage by reason of the extent and character of the cargo of which it formed a part, so as to permit of the worthless stuff being dumped overboard before the arrival of the vessel in the United States, ought not, in justice, to debar the importer from successfully contending that the worthless material when it reached this country was not goods, wares or merchandise within the intent of the tariff acts.

Judgment of the Circuit Court of Appeals is reversed; judgment of the Circuit Court affirmed; and the cause remanded to that court with a direction to carry its judgment into effect.

True copy.

Test:

Clerk Supreme Court, U. S.

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